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ENVIRONMENTAL PROTECTION

LAND USE MANAGEMENT

DIVISION OF LAND USE REGULATION

Notice of Proposed Substantial Changes upon Adoption to Proposed Rule Amendments

Coastal Permit Program

Coastal Zone Management

Public Access

Proposed Changes: N.J.A.C. 7:7-7.6, 7.8, 7.9, 7.11, 7.12, 7.14, and 7.18; and 7:7E-1.8, 3.48, 3.50, and 8.11

Proposed: April 4, 2011 at 43 N.J.R. 772(a).

Authorized By: Bob Martin, Commissioner, Department of Environmental Protection.

Authority: N.J.S.A. 13:19-1 et seq., 12:3-1 et seq., 12:5-3, and 13:9A-1 et seq.

DEP Docket Number: 05-11-03.

Public hearings concerning this proposal will be held as follows:

Wednesday, April 18, 2012, at 12:00 P.M.

Avalon Court Meeting Room

3100 Dune Drive

Avalon, New Jersey 08202

Wednesday, April 18, 2012, at 6:00 P.M.

Long Branch Council Chambers

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344 Broadway, 2nd Floor

Long Branch, New Jersey 07740

Submit comments by May 18, 2012:

Electronically at <http://www.nj.gov/dep/rules/comments>; or

in hard copy to:

Gary J. Brower, Esq.

Attn: DEP Docket Number: 05-11-03

NJ Department of Environmental Protection

Office of Legal Affairs

Mail Code 401-04L, P.O. Box 402

401 East State Street, Floor 4

Trenton, NJ 08625-0402

The Department of Environmental Protection (Department or DEP) requests that commenters submit comments on CD or DVD as well as on paper. Submittal of a CD or DVD is not a requirement. Submittals on CD or DVD must not be access-restricted (locked or read-only) in order to facilitate use by the Department of the electronically submitted comments. The Department prefers Microsoft Word 6.0 or above. Macintosh formats should not be used. Each

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comment should be identified by the applicable N.J.A.C. citation with the commenter's name and affiliation following the comment.

This notice of proposed substantial changes can be reviewed or downloaded from the Department's web page at www.nj.gov/dep/rules.

Take notice that the Department, in accordance with the Administrative Procedure Act at N.J.S.A. 52:14B-4.10, is proposing substantial changes to the public access rules at N.J.A.C. 7:7 and 7:7E, based on comments received on the proposal of amendments to those rules published on April 4, 2011 (43 N.J.R. 772(a)). The public comment period closed on June 3, 2011. The proposed substantial changes include several changes to provide clarity and ensure consistent application of procedures and standards, and to reflect public comment on the proposal. Some of these proposed changes include providing increased transparency and public participation in both the Department and the municipal review process of Municipal Public Access Plans; restoring to the rules provisions requiring that public access incorporate, to the maximum extent practicable, fishing access and associated amenities, including parking that accommodates nighttime fishing; providing a new paragraph to address public access requirements for public highways; specifying a standard formula to calculate a payment amount for linear projects when a Municipal Public Access Plan requires a monetary contribution to be used to provide new or enhanced public access; and establishing a process by which the Department can revoke a Municipal Public Access plan for good cause.

Summary of Public Comments and Agency Responses:

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The Department received comments on the provisions proposed for substantial change from the individuals listed below:

1. Andrew Bednarek, Business Administrator, Borough of Avalon
2. Victoria Bingham, Statewide Conservation Advocacy Network of Wildwood NJ
3. Ray Bogan, Marine Trades Association
4. Kevin J. Broderick
5. David Brogan, New Jersey Business and Industry Association
6. Ralph Coscia, Citizens' Right to Access Beaches (C.R.A.B.)
7. Nicole Dallara
8. Stephanie Daniels, The Historic Paulus Hook Association
9. Melissa Danko, Marine Trades Association
10. Tim Dillingham, Executive Director, American Littoral Society
11. Al Dolce, Ocean County Federation of Sportsman
12. Hugh L. Evans
13. Stewart Farrell, Coastal Research Center, Richard Stockton College
14. William M. Feinberg, Esq.
15. Ryan Firkser
16. Tom Fote, Jersey Coast Anglers Association and the New Jersey Federation of Sportsmen's Clubs
17. Jack Fullmer, New Jersey Council of Diving Clubs
18. Elizabeth George-Cheniara, Esq., New Jersey Builders Association
19. Elkins Green, Director, Division of Environmental Resources, New Jersey Department of Transportation
20. Paul Haertel, Berkley Striper Club
21. Linda Haertel, Berkley Striper Club
22. Jerramiah Healy, Mayor Jersey City
23. Helen Henderson, American Littoral Society
24. Jim Hill
25. Timothy G. Hill, Interim Borough Administrator, and Director of Parks and Recreation, Borough of Highlands
26. Paul Hottinger
27. Kevin Ingram
28. Edward J. Kelly, The Maritime Association of the Port of New York/New Jersey
29. Irene Kelly
30. Jerry Kelly, Shark River Surf Anglers
31. Christopher Len, Hackensack Riverkeeper and NY/NJ Baykeeper
32. Vincent Lepore
33. Ellis Levin
34. Robert E. Lick
35. Peter L. Lomax, The Lomax Consulting Group, LLC
36. Joe Loreti, President, NJ Chapter, Striper Coast Surf Casters Club

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37. Stephen Marks, Hudson County Planning Director
38. Tanya R. Marione-Stanton, Senior Planner to Jersey City Environmental Commission, Jersey City Division of City Planning
39. Amy Martin, PSEG Services Corporation, on behalf of Public Service Electric & Gas and PSEG Fossil LLC
40. David J. McKeon, Ocean County Planning Director
41. Ray Menell, Asbury Park Fishing Club
42. Margaret Mroz
43. Captain Adam Nowalsky, Chairman, Recreational Fishing Alliance
44. Greg O'Connell, NJ Chapter, Recreational Fishing Alliance
45. Sam Pesin, President, Friends of Liberty State Park
46. Andrew J. Provence, Esq., Ansell Grimm & Aaron, on behalf of the American Littoral Society, Bayshore Regional Watershed Council, Citizens Rights to Access Beaches, Edison Wetlands Association, Elizabeth River/Arthur Kill Watershed Association, Environmental New Jersey, Future City, Inc., Hackensack Riverkeeper, Manasquan Fishing Club, New Jersey Environmental Lobby, PaddleOut.org, Public Employees for Environmental Responsibility (New Jersey Chapter), New Jersey Sierra Club, and Sunrise Bay Anglers
47. Joseph Rettagliata, Chairman, Monmouth County Planning Board
48. Joseph S. Reynolds, Co-Chair, Bayshore Regional Watershed Council
49. Thomas E. Robb
50. Charles Santoro
51. Thomas Siciliano
52. David Sikorski
53. Doug Stuart
54. Douglas Taylor, Jersey Devil Fishing Club of Bellmawr
55. Jeff Tittel, Director, New Jersey Chapter, Sierra Club
56. Rick Traber
57. R. Van Strien
58. John G. Valeri, Jr., Wolff & Samson PC on behalf of the New Jersey Turnpike Authority
59. John L Weber, Surfrider Foundation, (Jersey Shore Chapter and South Jersey Chapter)
60. Jillian Weislo, Edison Wetlands Association
61. Kristin F. Wildman, The Lomax Consulting Group, LLC
62. Andrew Wilner, Sustainability Solutions
63. Christopher Winkel
64. Chris Witter
65. Joe Woerner, Jersey Shore Chapter of the Surfrider Foundation
66. The following 25 individuals sent in form letters stating that if 24/7 beach access at any of the places they frequent is restricted in any way, they will no longer bring their business to the State.

Ernie Abbamonte
Dennis Bravo
James Callahan
Matt Chiccarine

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Jason Cohen
Greg Crossland
John Deering
Tom Farrell
Jacob Freeman
Jason Gribschaw
Daniel Jacobs
John F. Jacoby
Nathaniel Marchetti
Bob Mohr
Jose A. Morel
Chau Nguyen
Chris Nosal
Ulumje Greg Pereborow
Timothy Schipper
Micole Sharlin
Bradley M. String
Ronald Sullivan
Daniel Timmins
Arthur Wehrhahn
Mark A. Yocum

67. The following 326 individuals sent in form letters objecting to allowing towns to create their own public access plans without any State standards or oversight. Note: The signatures of 15 of these individuals were entirely illegible and so their names are not included in this list.

Daniel Acker
Manah Acker
Eugene Aiken
Tom Algamo
Sari Alkhjeel
Michelle Ameida
Joaquin Anderson
Joe Araman
Pasquale Attanasio
Ayanna Aviles
Anthony Batlout
Karen Battinger
Zachary Borchuk
Jim Bourne
Justin Bridges
Bunce Brotic
Eryk Brito
Joe Brown
Bruce Buckiewucz

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Ed Bunnell
Tim Burden
Chris Burle
Robert Brewer
Luke Cahill
Jonathan Camacho
Lucile Canniggao
W. Cantelmo
Mexico Refugio Capilla
Cathy Carlson
Tyler Carter
Bobby Celli
Maegan Cerruti
A.J. Chivaro
Ryan Church
Gary Coleman
Chris Color
Jennifer Cook
Amanda Conceica
Dylan Corona
Jose Costa
Nick Costa
Robert Clevenger
Lamayjah D.
Jim D'Annonzio
Dominick Cardella
Zach Christian
Daniella Daly
Kevin David
Dillon Davies
Darrius Raymond Daivs
Joshisona Davis
Kim Davis
Nick DeLisa
Ivan Delafunete
Luke Dellaperute
Joe DeLucia
Jonathon De Silva
Diana Diaz
Roman Divan
Vinny Donisto
P. Dorsi
Kevin Dos Santos

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Morgan Downs
Arianna Duncan
Jacob Dresser
Bill Dooks
Derek Drummond
Alex Dunn
Stan Dziuba
Drew Eastwood
Mergene Edgulban
Cassidy Egan
Osi Emele
Warren Emley
Alejandro Esiobar
Janis Faler
Stephen Farkouh
Gabby Fernandes
Megan Filoramo
Joseph Fields
Fred Fillippone
Ana Fracao
Glenn Frattini
Roi Frazao
Dan Friedman
Joe Fruncillo
Ken Ganz
Thomas Garcia
Hope Gardiner
John Garzon
Eric Geller
Robert Gery
Kevin Gian
Anthony Giglio
Ryan Gillaspie
Sergio Girminaino
Nikki Glassman
Joseph Golubor
Briana Gomes
Nicole Gomez
Charles Goodson
Emily Gottlieb
Pat Grasso
S. Grant
Yaritza Grant

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Kathleen Greenwald
Barbara Grossman
Ryan Gundel
Brendan Gutzler
Jim Hanf
Scott Hann
Scott Hanson
A.J. Hanron
Pat Hemeraly
Manuel Hernandez
Michael Hernandez
Emily Hieger
Jackie Horn
Parker Hilton
Don Hudson
Mike Hunt
A. Illegible
Bill Illegible
Brett Illegible
Cristian Illegible
Donald Illegible
Elton Illegible
Gregory Illegible
Janice Illegible
Jeremy Illegible
Joe Illegible
Lois Illegible
Mara Illegible
Michael Illegible
Mike Illegible
Nicky Illegible
Richie Illegible
Ryan Illegible
Zack Illegible
Jack Inman
Jessica Isabella
Tony Jackson
Ronnie Jackson
Pete Jaminski
Jane Jasien
Pedro Jimenz
Jittal Jill
Chris Jones

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Cameron K.
Chuck Kababick
Karly Kachonisky
Laura Kale
Ted Kamis, Jr.
Alex Kartchell
David Kelly
Jerry Kelly
Wayne King
John Kinsey Jr.
Ann Kratz
Lyndsay Kutiak
James Laco
E. Lagrotteria
Salvatore LaMarca
Anna Lamb
Mike Langan
Victor Layton
Caroline Leite
Sam Leitner
Alfie Lenkiewicz
Keith Levitz
Renato Limo
Brett Mahon
Chris Maida
Michele Maida
Roy Magia
Bryan Maldonado
P. Malley
O.J. Mareak
Anthony Martino
Mel Martens
John Masiello
Robert Massa
Dan Mattis
Andi Maurp
Barbara McDermott
Sheldon McCie
Brienne McDonough
Gregory McLead
Mike Megill
Luana Mendes
Robert Mentel

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Jamie Mettem
Diane Meucraz
Jill Milano
The Milano Family
Terry Miller
Jessica Mineo
Elizabeth Moeno
Brett Murphy
Mikaela Muniz
Vinh Nguyen
Lois Noland
Cynthia No Name
Jermaine No Name
Nayeli No Name
Amanda Norwills
Bud Nunmain
Greg O'Connell
Lisett Olivera
Keone Osby
Kathi Owens
Michelle P.
Athanasia Pappas
Carl Patron
Thomas Park
J. Parker
Bob Pastor
Rein Pelle
Jack Pensabene
R. Phillips
Ngo Phuonc
Tyler Piantanida
Eric Pidqean
Al Pohlman
Scott Policastro
David Pollera
Tina Pope
Tony Pope
Jim Porcello
Tom Porowski
PJ Raia
Itzel Rameriaz
Amado Ramirez
Brian Reale

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Travis Reed
Scott Reeves
Joe Reinor
Kris Renart
Michael Repsha
Krystal Rivera
Lilian Robles
Chelsea Rocha
Lizzet Rojas
Chris Rooinson
Nick Ruppea
Jenna Russo
Larissa Russo
Chris Sanchez
Monaca Sanon
Brian Santes
Apollo Santiago
Christina Santoro
Ryan Santos
Ebony Saxton
Melissa Schleich
Bob Shoykhet
Eduasdo Sia
Chris Siccbi
B.J. Sichlor
Ron Sickler
Aliyah Smith
Richie Smith
Samantha Smith
Marissa Stall
Kevin Staub
Robert Staub
Ron Stocktum
Nick Stokes
Christine Sturt
Kendra Sullivan
Emily Sutton
Brian Sweeney
Robert E. Tallman, Jr.
Darby Tarrant
Don Tarrant
Adrianna Therstad
Kenny Throckmorlon

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Alex Todd
Matt Tomernk
No name Torris
Angelo Tracey
Rob Trimble
Julia Tupy
Darlene Tyler
Brian Unger
Norberto Vagas
J. Vamvas
Robert Van Buren
Meghan Van Note
Gene Van Severen
Angel Vivescanos
Nicole Walker
Chris Wech
William Wei
Laura Wessels
Kim Westhead
Sara Wheaton
John Whittaker
Greg Widmaier
Dyamante Williams
Illegible Williams
Grace Wills
John Wills
Chris Witter
Andrea Witter
Richard Wollner
Robert Woods
Junior Yocute
Gabby Yoseiso
Robby Young
Robert Young
Tony Zappolil

A summary of the comments and the Department's responses follows with respect to those provisions for which substantial changes are proposed. The number(s) in parentheses after each comment identifies the respective commenter(s) listed above.

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Rules too vague or broad

1. COMMENT: There is not enough detail and information in the proposed rule. Access is a problem right now and it is not going to improve under these proposed rules. (51)

2. COMMENT: The rules are too vague and will be used to get around proper access. Since the rules are so vague as to let the towns do whatever they please instead of providing the necessary access, these rules will be open to political gain and subject to abuse. (7)

3. COMMENT: The amendments were not crafted very well. Department spokespersons have said that opponents to the rules do not understand what is being proposed. Does that speak ill of the intelligence of the public or of the communication skills of the Department, which believes that communication is vital to enhance public access opportunities? (49)

4. COMMENT: The rule has some parts that make sense but it falls short on a lot of the public interest at stake here. The DEP must take into consideration all of the testimony heard from the stakeholders and their concerns, and rewrite the rules to give the public a little more protection. (52)

5. COMMENT: The rules as written are too broad. Many people with different interests are going to be affected. The rules are very vague, and leave loopholes for businesses and for development, and allow the townships to do whatever they want to with waterways and beaches.

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The rules do not support the people and their recreational activities or their uses of public resources. (64)

RESPONSE TO COMMENTS 1 THROUGH 5: The Department believes that the proposed rules establish a comprehensive framework to provide meaningful public access to the State's citizens and encourage municipalities to develop plans that ensure this access while considering each locality's specific circumstances. The Department recognizes, however, based on comments received on the proposal, that changes to the proposed rules are necessary to provide clarity and ensure consistent application of procedures and standards. Therefore, the Department is proposing several substantial changes to the rules as proposed. The proposed changes are explained further in the Responses to Comments below.

Municipal role in providing public access and public involvement in review of Municipal Public Access Plans

6. COMMENT: Towns should not be in control of public access. (6, 20, 21, 30)

7. COMMENT: Towns should not be in control of public access. The commenter provided an example of how he was arrested at 15 years old for not having a beach badge while surfing and how Sea Girt spent \$85,000 of taxpayer money to fight a \$30,000 penalty for killing a Federally listed species. The courts have spoken clearly that the Public Trust Doctrine is "one size does fit all." (65)

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8. COMMENT: The biggest problem with this rule proposal is giving control to municipalities like Sea Bright, Deal, and many others because trusting the municipalities to do what is good for all the public is difficult. Municipalities do not always listen to non-municipal residents because they do not vote in the town and they do not contribute taxes to the municipality. (11,16)

9. COMMENT: The fiduciary responsibility to protect the public trust rights lies with the State. The authority should be with the Governor and Legislature, not delegated to the Department. The Department should not be giving the municipalities the authority to control public access. (49)

10. COMMENT: Public access decisions should not be made by towns because towns are charging residents a different price for beach badges than they charge non-residents. This is proof that the towns are not doing the right thing to start with and the DEP does not seem to know it.(59)

11. COMMENT: Restrictions have been placed upon the right of public access frequently at the behest of beachfront property owners who have the necessary influence with municipal governing bodies in order to implement these restrictions. At the behest of fishermen, the DEP created an access route in the Borough of Deal which consisted of a staircase down to the beach and to two jetties. The Borough has locked this access route and has removed a staircase on

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another street which led to a jetty that is a favorite among surf fishermen. It has also vacated street ends as well. One particularly restricted area is on Long Beach Island where successive streets throughout the North Beach area are all marked "private street no beach access." The proposed rules regarding beach access will certainly make the situation worse. The DEP virtually abdicates its responsibility to protect the right of the public to access the beach to the local municipal governments which have in the past been largely responsible for the restrictions. The beaches in New Jersey should be protected by State government rather than property owners and politicians. (14)

12. COMMENT: There are more than 250 municipalities that have waterfront access to tidal waters. Each one will be given the opportunity to write its own individual municipal access plan. This will be giving the authority and police powers to enforce where and when the public will have access to tidal waters within their municipality. There will be 250 different rules and regulations instead of one. Many of these towns have in the past shown their unwillingness to allow public access. The State of New Jersey will no longer be the advocate for the public access rights that belong to all of us. The DEP is relinquishing its responsibility as the trustee of the public trust doctrine to protect these rights. This is a formula for abuse. (36)

13. COMMENT: The towns should not be allowed to control the amount of public access. The DEP is delegating to towns to adopt these plans, to develop these plans, and in many cases up and down the coast, not only on Long Beach Island, towns have eliminated off-street parking. They have closed up public access points. They have sided with private property owners in

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public access disputes and resisted public access to the beaches created with taxpayers' dollars and are going to be in control of the public access decisions. (10)

14. COMMENT: Control of public access should not be given to municipalities. As an example, the commenter stated that the City of Long Branch passed a resolution to give five parking spaces to the public when, had the City performed its due diligence, the public should have had access to 15 or 16 parking spaces. (32)

15. COMMENT: It is important within the context of the rules to give the citizens a voice in keeping public areas as they are. As an example, the commenter stated that Brant Beach has a park that provides a limited amount of open space in an already overdeveloped community. Citizens are concerned that alterations are planned to the park that many feel are detrimental. The rules that are the basis for access plans and other waterfront improvements should contain sufficient protections for the taxpayers and residents to have some say in whether or not that park is altered. (33)

16. COMMENT: Proposed N.J.A.C. 7:7E-8.11(i) provides that if the Department approves a Municipal Public Access Plan, it shall publish notice in the New Jersey Register and DEP Bulletin. There is no useful purpose for this requirement. It is suggested that the rule provide that, if approved, the draft plan will be published in the New Jersey Register thereby beginning a public comment period and at least one public hearing. Any public comments need to be

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considered before the draft Municipal Public Access Plan is conditionally approved and returned to the municipality. (59)

17. COMMENT: The proposed rules allow individual municipalities too much authority over access to the public's waterways and beaches. Many communities along the coast are employing methods to restrict the public's access to these resources. Some communities treat the beach adjacent to million dollar homes as a playground for the privileged. Other communities have been imposing seasonal restrictions to prevent fishermen access in the spring and fall, and others are restricting parking. The Department cannot rely on municipalities to provide proper 24-hour seven-day-a-week access to waterways and beaches. The Department is entrusted to ensure that 24-hour access seven days a week is provided. Without rules requiring unlimited access, these communities will continue to restrict or eliminate access to certain user groups such as fishermen and surfers. (15)

18. COMMENT: The Department must continue to regulate public access to coastal areas. Coastal towns should not decide what is best for the public. Residents of inland communities have no voice in any actions taken by communities such as Deal, Long Branch, or Sea Bright that would restrict or change access. (41)

19. COMMENT: It is understood that Municipal access plans are optional, but if a municipality decides to submit a plan, will there be a mechanism for a public hearing at the

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municipal level prior to approval at NJDEP and, if a public hearing mechanism is in place, will that public hearing be optional or mandatory? (59)

20. COMMENT: The rules do not provide the public with the ability to review and comment on a proposed Municipal Public Access Plan prior to its consideration by the Department. There is no requirement that a hearing be held on a proposed plan or that the plan be published in the New Jersey Register for comment. The rule only provides that the Department will publish its decision to approve a plan in the New Jersey Register and DEP Bulletin. The Department's determination is likely to be a rubber stamp approval. (17)

21. COMMENT: Proposed N.J.A.C. 7:7E-8.11(e) through (g) set forth the contents of a Municipal Public Access Plan and do not include a public participation component. As a result, the public residents and non-residents alike may be excluded from participation in the plan development. Nothing in proposed N.J.A.C. 7:7E-8.11(e) through (g) prevents a local mayor from sitting down with the Borough Administrator and drafting a Municipal Public Access Plan. It is suggested that language be added to the rule specifying that this process needs to be done through the town's governing body with members of the public involved in plan development. (59)

22. COMMENT: The public comment opportunities on a Municipal Public Access Plan need to be expanded. As proposed, the Department would publish in the DEP Bulletin the agency's decision to approve a municipality's plan, but no public comment opportunity is given

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before the Department makes that decision. The public would only be able to provide comment when the Municipal Public Access Plan came before the Municipal Council or Committee for adoption as a component of the municipal Master Plan, after Department approval. The public must be involved in shaping the Municipal Public Access Plan from the beginning, including public hearings to hear from citizens on the areas and types of access that they would like the municipality to provide. As proposed, the municipalities would be able to determine where and how access is provided with no public input. (55)

23. COMMENT: The public has no role in the creation of Municipal Public Access Plans. (31)

24. COMMENT: The rule does not require public participation in the Municipal Public Access Plan process. Under the proposed rule, a Municipal Public Access Plan is a plan prepared by a municipality stating what public access, and any related amenities, are available and what additional public access and related amenities will be provided. The rule does not require any public participation in the preparation, municipal adoption or Department's approval of municipal plans. A public hearing with adequate notice would be helpful to municipalities in developing a credible needs assessment as required by the proposed rule, and would further help a municipality distinguish the types of access and amenities that would be meaningful or conversely, useless, to the public. The Department does not see any value in letting the public have any input in the planning process. (46, 48, 59)

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25. COMMENT: N.J.A.C. 7:7E-8.11(j) requires a municipality to initiate action to incorporate the Municipal Access Plan into their municipal master plan after they have received approval from the Department. Under the Municipal Land Use Law, the municipal planning board would then be required to hold a public hearing. There does not appear to be any requirement for a municipality to involve interested residents and business owners earlier in the public access planning process. It would be prudent to require an opportunity for public involvement prior to the municipal submittal to the Department. This could be accomplished through holding a visioning exercise or forming a stakeholder group to guide plan development. (25, 47)

26. COMMENT: A municipality should be required to hold at least three public hearings as it develops a Municipal Public Access Plan to submit to the Department and the Department should take public comment on the final Municipal Public Access Plan submitted by the municipality, before issuing a final consistency decision, as part of its review process. (55)

27. COMMENT: It is suggested that the draft plan have at least three public hearings instead of the normal two hearings for local ordinances because the plan will affect non-residents as well. (59)

28. COMMENT: The State must recognize that the drafting of a Municipal Public Access Plan is not for the benefit of the residents of that municipality only: it is for the benefit of

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everyone in the State who wishes to visit those shores. Accordingly, the rules governing Municipal Public Access Plan's need to be more inclusive of the general public.(59)

RESPONSE TO COMMENTS 6 THROUGH 28: Under these rules, the Department does not give control of public access to the municipalities. The rules establish goals and basic requirements for public access and are intended to encourage municipalities to take an active role in designing and ensuring public access to beaches and tidal waters in ways that will work best for their respective circumstances. The rules as proposed require a municipality to obtain approval of its Municipal Public Access Plan from the Department in order for the plan to be operational. The Department will work with the municipalities on development of their access plan and the plans will be required to meet the goals of the public access rules.

In response to these comments, the Department is proposing to add a new N.J.A.C. 7:7E-8.11(e)6 that requires municipalities to include as part of their application for approval of a Municipal Public Access Plan, documentation of any public meetings held by the municipality to accept comments on the proposed access plan. In addition, to assure that an opportunity for public input on proposed Municipal Public Access Plans is available in all cases and that the Department can consider this input in making its determination on a proposed Municipal Public Access Plan, the Department is proposing to change N.J.A.C. 7:7E-8.11(i) through (l), regarding the review and approval of proposed Municipal Public Access Plans.

While the Department does not believe it is necessary to require proof of public involvement prior to submittal of a proposed plan to the Department, to assure that an opportunity for public input on proposed Municipal Public Access Plans is available in all cases

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and that the Department can consider this input in making its determination on a proposed Municipal Public Access Plan, the Department is proposing to change N.J.A.C. 7:7E-8.11(i) through (l), regarding the review and approval of proposed Municipal Public Access Plans.

Under the proposed changes to N.J.A.C. 7:7E-8.11(i), the Department will provide a 30-day public comment period on applications for approval of Municipal Public Access Plans and post the proposed plans on the Department's website, notify by e-mail individuals who have requested notice of the applications, and publish notice in the DEP Bulletin. The Department may request that the municipality revise its proposed Municipal Public Access Plan after the close of the public comment period. Once the Department receives the requested revisions, the Department will thereafter, within 60 days, notify the municipality that the proposed Municipal Public Access Plan either satisfies the requirements of the rules, specifically N.J.A.C. 7:7E-8.11, Public access, and is approved, or is not approved, with an explanation of why the proposed Municipal Public Access Plan is not satisfactory. If the Department does not request revisions to the proposed Municipal Public Access Plan, it will issue its decision regarding approval or disapproval within 60 days of the end of the public comment period. The Department will post notice of its determination to approve or disapprove a proposed Municipal Public Access Plan on its website, publish notice in the DEP Bulletin and will also notify by email individuals who have requested notice of the applications.

Once the Department approves a proposed Municipal Public Access Plan, N.J.A.C. 7:7E-8.11(j) requires the municipality to incorporate the approved plan into its Master Plan, which is accomplished by resolution in accordance with the Municipal Land Use Law. To increase transparency and public participation in this municipal process, the Department is proposing

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changes at N.J.A.C. 7:7E-8.11(j)2 to require a municipality to notify the Department two weeks in advance of the dates and times of any scheduled public meetings on the Department-approved Municipal Public Access Plan. The Department will post the meeting information on its website at <http://www.nj.gov/dep/bulletin/> and will also send the information by e-mail to individuals who have requested notice of Municipal Public Access Plan applications.

Under N.J.A.C. 7:7E-8.11(k), once the Department receives from the municipality the resolution incorporating the DEP-approved Municipal Public Access Plan into the Master Plan, public access required by the Department's coastal permits must be provided in accordance with the Municipal Public Access Plan. To ensure the public is made aware that a Municipal Public Access Plan is operational for this purpose, the Department is proposing a change at N.J.A.C. 7:7E-8.11(k) to provide that the Department will include on the Department-approved Municipal Public Access Plan that it posts on its website the date of its receipt of the resolution.

Under N.J.A.C. 7:7E-8.11(k), once the Department receives from the municipality the resolution incorporating the Department-approved Municipal Public Access Plan into the Master Plan, public access required by the Department's coastal permits must be provided in accordance with the Municipal Public Access Plan. The proposal at N.J.A.C. 7:7E-8.11(c) 1, 2, and 3 specifies whether public access requirements are based upon the terms of a Department-approved Municipal Public Access Plan or upon the rules. As requirements contained in a Municipal Public Access Plan only become operational upon the Department's receipt of the municipal resolution, the Department is proposing changes at N.J.A.C. 7:7E-8.11(c) 1, 2, and 3 to clarify that the requirements of a Department-approved Municipal Public Access Plan will only be used to determine public access requirements after the Department receives the resolution

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incorporating the Department-approved access plan into the Master Plan, consistent with N.J.A.C. 7:7E-8.11(k).

At N.J.A.C. 7:7E-8.11(l), which requires a municipality to obtain prior approval from the Department in order to modify its Department-approved Municipal Public Access Plan in ways that impact the location or type of access or that institute or amend the terms of a contribution in lieu of onsite public access, the Department is proposing changes that provide that the Department's review of the requested plan amendments will be conducted and a determination made in accordance with N.J.A.C. 7:7E-8.11(i), described above. Upon the Department's approval of the amended Municipal Public Access Plan, the municipality must comply with the procedures at N.J.A.C. 7:7E-8.11(j), described above, to incorporate by resolution the approved, modified Municipal Public Access Plan into its Master Plan.

The Department believes that these amendments will provide appropriate opportunities for public input and improve the information available to the Department for determining whether a proposed public access plan is appropriate. Rather than providing notice through the New Jersey Register and scheduling additional public meetings, the Department believes the changes being made to expand the notice provided to the public, including through direct notice by e-mail to all individuals who notify the Department of their interest, will provide unparalleled notice both of the opportunity to comment on pending applications as well as of scheduling of public meetings regarding the proposed plan.

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29. COMMENT: Municipal governments only have to be responsive to their respective constituents while non-residents have little or no redress. The State rules should require access for residents as well as non-residents of a municipality. (34, 59)

RESPONSE: The rule as proposed requires a municipality to obtain approval of its Municipal Public Access Plan from the Department. The public access goals listed at N.J.A.C. 7:7E-8.11(b) as proposed to be changed in this notice apply to all public access provided to satisfy N.J.A.C. 7:7E-8.11, including public access provided in accordance with Department-approved Municipal Public Access Plans. As indicated at N.J.A.C. 7:7E-8.11(b)1, all levels of government are to create opportunities for public access on a non-discriminatory basis. Accordingly, the Department will not approve a Municipal Public Access Plan that provides for public access that is not open to non-residents.

30. COMMENT: It is strongly recommended that the development of a Municipal Public Access Plan be coordinated as much as possible with the municipal master planning process. There are well established and familiar processes in place at the local level that should identify the best suited locations to provide meaningful public access in the municipality. (18)

31. COMMENT: The commenter expressed support for the rule, but seeks assurance that the Municipal Public Access Plan requirement does not turn into the kind of costly and lengthy process that so often results from DEP rulemaking. (1)

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32. COMMENT: The Department should establish a timeline for its review and approval of a Municipal Public Access Plan. (13)

RESPONSE TO COMMENTS 30 THROUGH 32: The Department's intent in proposing the six-year term for a Department-approved Municipal Public Access Plan was to enable a municipality to review and update as appropriate the Municipal Public Access Plan at the same time as the municipality reviewed its municipal Master Plan in accordance with the Municipal Land Use Law, while providing the Department with a periodic opportunity to review progress toward accomplishing the goals established in the approved Municipal Public Access Plan. The changes summarized in the Responses to Comments 87 through 90 and Comment 91 reflect the Department's intention to establish a process that allows municipalities to develop and update Municipal Public Access Plans in a coordinated manner with the municipal master planning process.

In response to requests for further specificity as to the Department's review process, the Department is proposing changes at N.J.A.C. 7:7E-8.11(i) and (j). In addition to the establishment of an opportunity for public comment as part of the Department's review process, as discussed above in the Response to Comments 6 through 28, at N.J.A.C. 7:7E-8.11(i)3 the Department is proposing changes to specify that the Department may request revisions to the proposed Municipal Public Access Plan after the close of the public comment period. This clarifies that the Department is not limited to either approving or denying a proposed plan, but may work with the municipality to attempt to address any issues that became apparent either

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through the Department's review of materials provided or as a result of public comment. Proposed new N.J.A.C. 7:7E-8.11(i)4 would require the Department, if revisions are requested, to notify the municipality in writing within 60 days of the receipt of the revisions that the Municipal Public Access Plan either satisfies the requirements of N.J.A.C. 7:7E-8.11 and is approved, or that it is not approved with an explanation of why the proposed plan does not satisfy the rules. Proposed new N.J.A.C. 7:7E-8.11(i)5 specifies that, if no revisions are requested by the Department, the Department shall notify the municipality in writing within 60 days of the end of the public comment period that the proposed Municipal Public Access Plan is approved or is not approved.

At N.J.A.C. 7:7E-8.11(i)6, changes are proposed to establish the method that the Department will use to provide notice of its determination on an application for approval of a Municipal Public Access Plan. Particularly, the Department will provide notice of its determination on the Department's website; by e-mail to individuals who have requested notice of applications for approval of Municipal Public Access Plans; and by publishing the determination in the DEP Bulletin.

The Department believes that these changes will provide predictability in the review process while assuring that the municipality is provided with appropriate opportunities to remedy any deficiencies in the initially submitted proposed plan and that the public has an opportunity for input into the contents of the plan.

Standards for Municipal Public Access Plans (N.J.A.C. 7:7E-8.11(c) through (m))

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33. COMMENT: N.J.A.C. 7:7E-8.11(n) includes public access standards for certain types of development for municipalities that do not have an approved Municipal Public Access Plan. However, the public access requirements for municipalities with a Municipal Public Access Plan are not proposed within this rule. Municipalities should not have the autonomy to develop specific standards that govern public access on privately owned sites. The rule should be modified to include uniform public access requirements for all site uses within Municipal Public Access Plans, similar to those proposed within N.J.A.C. 7:7E-8.11(n). (39)

34. COMMENT: These rules should give towns guidance on what a plan should or must contain. (31)

35. COMMENT: The Department should eliminate the concept of a Municipal Public Access Plan that does not have State standards. (17)

36. COMMENT: The proposed rule should create a process for review of Municipal Public Access Plans and standards for their approval by the Department. (46, 48)

37. COMMENT: The Department should have strict standards for approval of Municipal Public Access Plans and compliance and enforcement mechanisms. (55)

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38. COMMENT: The rules set an extremely low bar for public access requirements. The rules should encourage towns to exceed the standards in the rules and not limit them to the rule standards. (31)

39. COMMENT: Towns should not be able to create their own public access plans without any State standards or oversight. (67)

40. COMMENT: The Department is proposing an approach whereby municipalities, many of which have repeated and overtly thwarted public access to “their” shores, now hold the power to dictate the terms of public access. The Department has not provided any firm standards that municipalities must meet in creating their access plans. (46)

41. COMMENT: The public access rule proposal is strongly opposed because it will result in less access for the public. The proposed rules provide shore towns with the ability to create their own public access plans without State standards or oversight. Certain seaside communities have historically prevented or limited public access to their beaches; this proposal would allow these communities to continue their restrictions on public access and they may even further restrict public access. (50)

42. COMMENT: Proposed N.J.A.C. 7:7E-8.11(j) sets forth the process once the Department approves the Municipal Public Access Plan. This process is severely flawed. Many towns pass resolutions without public comment. Typically it is done at the beginning of a

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regular town meeting and the public does not have a chance to comment the same way they would if it were a local ordinance. The town would say that the plan has already been approved by the Department. The town would then be forced to either adopt the plan and ignore the public comment or not adopt the plan and put themselves in a Department-Municipal Public Access Plan limbo, subjecting themselves to penalties imposed on towns with no plans. Full public participation needs to follow these plans every step of the process. This includes allowing public hearings on the municipal level while drafting the plan, public hearings on the State level once the Department has approved the plan, and public hearings on the local level again to adopt the Department approved plan. Non-residents need to be given ample opportunity to review and comment on the plan. (59)

43. COMMENT: The proposal allowing each locality to set and enforce the rules will lead to the “Balkanization” of New Jersey’s rules and the injustice of uneven enforcement of those rules. (12)

RESPONSE TO COMMENTS 33 THROUGH 43: As indicated in the Response to Comments 6 through 28, the rules do not give municipalities the ability to establish public access standards without having to meet State standards and without Department oversight. Instead, the rules establish goals and basic requirements for public access and are intended to encourage municipalities to take an active role in designing and ensuring public access to beaches and tidal waters in ways that will work best for their respective circumstances. The plans developed by the municipalities are only effective if they are approved by the Department.

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Rather than providing unfettered discretion to municipalities, the proposed rules, as amended through the further changes being proposed at this time, lay out a framework with requirements that must be met both in municipalities with Department-approved municipal public access plans and those without.

The rules provide goals for public access at N.J.A.C. 7:7E-8.11(b), including that public access be on a non-discriminatory basis and that all existing public access must be maintained to the maximum extent practicable, that will be utilized by the Department in determining whether a proposed plan should be approved.

The rules provide guidance on the types of activities that will be considered to provide public access. Particularly, the proposal at N.J.A.C. 7:7E-8.11(n)1iii specified examples of types of public access that the Department would accept to satisfy public access requirements for Department permits for activities in municipalities that do not have a Municipal Public Access Plan. While this subparagraph applied specifically to commercial development, this same list was incorporated for other types of development in municipalities that do not have Municipal Public Access Plans by cross-reference at N.J.A.C. 7:7E-8.11(n)2iii(1), (n)2iv, (n)3ii, and (o)4. The specified acceptable methods of providing public access include a public accessway located parallel to the shoreline with perpendicular access; a boat ramp, pier, fishing, or other direct access to the waterway; a waterfront pocket park; public restrooms; and/or additional public parking to accommodate public access, beyond that needed to support the development to be located on the site.

It is the Department's expectation that these same forms of public access will be incorporated in Municipal Public Access Plans approved by the Department. To clarify that

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these same types of public access are also what the Department expects to be included in proposed Municipal Public Access Plans that are submitted seeking Department approval, in response to these comments the Department is proposing to delete the list of public access options from N.J.A.C. 7:7E-8.11(n)1iii (as well as the cross-references to this list discussed above) and incorporate the list into the public access goals at N.J.A.C. 7:7E-8.11(b)3i, which are applicable in all municipalities, both those with Municipal Public Access Plans and those that do not seek approval of such a plan. Relocating the list of public access options to N.J.A.C. 7:7E-8.11(b)3i clarifies that the list applies not only to site-specific public access projects, but also to Municipal Public Access Plans. In addition, to further clarify that these standards are applicable to Municipal Public Access Plans, the Department, at N.J.A.C. 7:7E-8.11(d) is proposing to add a cross-reference to provide that Municipal Public Access Plans shall satisfy the public access goals at N.J.A.C. 7:7E-8.11(b). To complete the list of requirements and goals that Municipal Public Access Plans must satisfy, the Department is adding to the list referenced in subsection (d) a reference to the paragraphs that make up that subsection, proposed N.J.A.C. 7:7E-8.11(d) 1 through 4. Furthermore, the Department is proposing to delete the phrase “local requirements such as local zoning and ordinance” from N.J.A.C. 7:7E-8.11(n)2iii(2) and (n)3iv to ensure that it is clear that public access satisfying this chapter may only be created in accordance with a Department-approved Municipal Public Access Plan, not any other local ordinances.

The rules specify at proposed N.J.A.C. 7:7E-8.11(g) types of development and geographic areas where municipalities proposing Municipal Public Access Plans are not allowed to include standards in the proposed plans that vary from the public access requirements

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applicable in the absence of a Department-approved Municipal Public Access Plan. For example, public access along the Hudson River may not be proposed that varies in anyway from the access required at N.J.A.C. 7:7E-3.48(e) (see the Response to Comments 115 through 121 regarding changes being proposed to this requirement).

The rules further require various analyses through which the municipality is required to review and itemize existing public access, identify public access needs that are not being met by existing facilities, formulate a plan for providing public access, and demonstrate that the public access proposed will meet the identified public need. As summarized in the Response to Comments 30 through 32, the changes made at this time will increase notice to the public of the filing of proposed Municipal Public Access Plans and opportunities for public input to assure that the public access proposed in a Municipal Public Access Plan truly satisfies a local public access need and satisfies the goals and requirements of the Coastal Zone Management rules.

Further, as discussed in the Response to Comments 6 through 28 above, the Department is proposing changes to the review process for Municipal Public Access Plans which still provides the Department with the ability to reject plans that do not meet the intent of the rules, while giving the individual municipality the ability to tailor the public access to be provided to the specific needs of that municipality. For example, if a municipality proposes to create a fund to accomplish the creation of a public access project that would not be possible through public access requirements that would be imposed on any individual project, such as creation of a waterfront park, the municipality is required to specify in the proposed Municipal Public Access Plan details regarding the project(s) to be funded, and provide sufficient information to allow the Department to ensure that the project satisfies some real need in that area through the required

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needs assessment (see proposed N.J.A.C. 7:7E-8.11(e)3). The implementation strategy at proposed N.J.A.C. 7:7E-8.11(e)5 requires specification of an implementation schedule to ensure that proposed actions will be conducted in a timely manner. Proposed N.J.A.C. 7:7E-8.11(f) specifies exactly how contributions to a fund to accomplish the project(s) specified in the plan are calculated to assure that this is accomplished in a consistent manner.

The Department believes that the rules provide adequate standards to guide municipalities in preparing a proposed plan and for the Department in determining if the proposed plan meets the rules' requirements.

With reference to compliance and enforcement, this public access rule can be enforced in the same manner as any other Department approval under the Coastal Zone Management rules pursuant to the Coastal Permit Program rules (N.J.A.C. 7:7-8), including imposition of monetary penalties.

While the Department anticipates most, if not all, municipalities that have voluntarily sought approval of a Municipal Public Access Plan will comply with that plan, the Department is now proposing to delete proposed N.J.A.C. 7:7E-8.11(m) to eliminate the six-year term for an approved Municipal Public Access Plan and instead require more frequent progress reporting on a five-year interval at proposed new N.J.A.C. 7:7E-8.11(j)4. Additionally, proposed new N.J.A.C. 7:7E-8.11(m) provides the Department with the ability to revoke an approved Municipal Public Access Plan for good cause. Good cause is defined to include failure to implement the Municipal Public Access Plan and/or noncompliance with the Municipal Public Access Plan such as inappropriate expenditure of dedicated Public Access Fund monies for purposes other than public access, conversion of public access sites to other uses, and failure to

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maintain existing public access and signage. These changes will give the Department the ability to act appropriately should instances of non-compliance with approved plans occur. As permits for projects imposing public access requirements will continue to be issued by the Department, both in municipalities that have obtained a Department-approved Municipal Public Access Plan and those that have not obtained plan approval, enforcement of the public access requirements contained in those permits will continue to be the sole responsibility of the Department as specified in the Coastal Permit Program rules and the Coastal Zone Management rules; municipalities will not gain any enforcement authority as part of obtaining approval of a Municipal Public Access Plan.

44. COMMENT: Municipal Public Access Plans should preserve existing public access and amenities and create increased public access and amenities. (46, 48)

RESPONSE: Proposed N.J.A.C. 7:7E-8.11(b)2 requires that existing public access to and along tidal waterways and their shores be maintained to the maximum extent practicable. Municipal Public Access Plans are intended to provide guidance for locating additional public access in the municipality. As discussed in the Response to Comments 33 through 43, the Department is proposing to delete the list of public access options from N.J.A.C. 7:7E-8.11(n)1iii (as well as the cross-references to this list) and incorporate the list into the public access goals at N.J.A.C. 7:7E-8.11(b)3i, which are applicable to all municipalities, both those with Municipal Public Access Plans and those that do not seek approval of such a plan. This will clarify that these are

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the types of additional public access and amenities that are anticipated to be created in all municipalities.

45. COMMENT: The Department's Public Trust in New Jersey guide (developed prior to this rule) could have been used to develop standards for towns to create better public access. Section III lists regulatory, planning, engineering and enforcement measures that municipalities can take to enhance access (pages 26 - 28). Section IV sets forth tools that municipalities can employ to enhance access, including access inventories, signage, zoning regulations, access ordinances, community outreach, etc. (pages 32 - 38). Part H of Section IV ("Model Municipalities") presents a virtual checklist of measures municipalities can take to promote access along various types of waterfronts (pages 36 - 38), which could also be transformed into the type of flexible, yet tangible, standards for plan review that should be included in the proposed rule. The Department should adopt standards for review of Municipal Public Access Plans that enhance access requirements. (46)

RESPONSE: In developing this rule proposal, the Department held stakeholder meetings seeking input from representatives of marine trades, environmental and recreational interests, business and industry and coastal municipalities. The purpose of this extensive stakeholder process was to take a fresh look at public access in order to maintain and enhance the public's access to coastal and tidal waters in a reasonable, planned manner. Although all details contained in the Public Trust in New Jersey Guide are not specifically incorporated in the rules, much of the guidance in the document, such as creating public access plans, adopting municipal

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ordinances to enforce public access, providing an inventory of public access facilities in the municipality, identifying those facilities with signs, and placing conservation restrictions on public access ways, is consistent with the requirements in the rule proposal. In addition, as discussed in the Response to Comments 33 through 43, the Department is proposing to delete the list of public access options from N.J.A.C. 7:7E-8.11(n)1iii (as well as the cross-references to this list discussed above) and incorporate the list into the public access goals at N.J.A.C. 7:7E-8.11(b)3i, which are applicable to all municipalities, both those with Municipal Public Access Plans and those that do not seek approval of such a plan. Relocating the list of public access options to N.J.A.C. 7:7E-8.11(b)3i clarifies that the list applies not only to site-specific public access projects in municipalities that do not have a Department-approved Municipal Public Access Plan, but also to projects in municipalities that do obtain Department approval of a Municipal Public Access Plan.

Coastal general permit for beach and dune maintenance activities (N.J.A.C. 7:7-7.6)

46. COMMENT: The Department should reconsider the proposed changes to N.J.A.C. 7:7-7.6 that eliminate the ability for municipalities to receive a coastal general permit for beach and dune maintenance activities unless those municipal applicants have developed and obtained approval of a Municipal Public Access Plan. Although the Department states that this policy will encourage municipalities to develop these plans, the policy may also burden disadvantaged communities that do not have the resources to immediately undertake efforts to develop a plan. By enforcing the proposed standards, the Department is eliminating the right to manage public

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beach and dune systems without an individual permit that is burdensome to obtain in both timing and cost. Shore communities rely on maintenance, including beach sanitation and raking, to maintain safe and healthy conditions for tourism. If it is decided to retain the above requirement, then a provisional use period should be established to give municipalities adequate time to prepare. Given that this rule will alter the manner in which many municipalities provide public access and maintain their oceanfront resources, the proposed rules should, at a minimum, include a period after adoption that municipalities could continue to apply for and receive this coastal general permit while they are preparing the necessary design and planning elements of their public access plan. (35, 61)

RESPONSE: The Department agrees that it is appropriate to allow municipalities time to prepare the necessary design and planning elements of their public access plan before restricting use of the general permit for beach and dune maintenance activities to those municipalities that have Municipal Public Access Plans. Accordingly, the Department is proposing changes at N.J.A.C. 7:7-7.6 to provide, at new N.J.A.C. 7:7-7.6(c), that, as of three years from the effective date of these amendments, the Department will not approve authorizations under this general permit to a municipality that does not have an approved and operational Municipal Public Access Plan in accordance with the rules. During that three-year period, municipalities without plans can continue to apply for and obtain authorization under the coastal general permit for beach and dune maintenance activities. The addition of new subsection (c) renders the need to differentiate between municipal applicants with Department-approved plans and those without Department-approved plans in N.J.A.C. 7:7-7.6(a) unnecessary. N.J.A.C. 7:7-7.6(a) is now applicable to all

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municipal applicants as well as non-municipal applicants. Accordingly, the reference to municipal applicants with Department-approved plans and non-municipal applicants is proposed to be deleted.

Coastal Zone Management Rules -- Definitions (N.J.A.C. 7:7E-1.8)

47. COMMENT: The definition of “homeland security facility” refers to the Federal Department of Homeland Security. It is suggested that this reference be changed to “United States Department of Homeland Security” as this is the Department’s official title. (19)

RESPONSE: The Department agrees, and is proposing a change in the definition of “homeland security facility” at N.J.A.C. 7:7E-1.8 to replace “Federal Department of Homeland Security” with the agency’s official title, “United States Department of Homeland Security.”

48. COMMENT: The rule defines homeland security so vaguely that almost any business on a waterway is exempt from the requirements of the rule. (45, 57, 62)

49. COMMENT: The definition of a homeland security facility is too broad and could have a very significant impact on access around bridges or rail lines which traverse New Jersey’s most productive bays, estuaries, and inlets. This definition could also include wind turbines, which could potentially impose restrictions around these structures. In addition, this definition could

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affect tidal waters located adjacent to power plants. It is important to maintain existing access rules around and near energy facilities for fishing. (43)

RESPONSE TO COMMENTS 48 AND 49: The definition in the proposed rules provides that homeland security facilities are those deemed to be critical in nature or a key resource by the New Jersey Office of Homeland Security and Preparedness, or the United States Department of Homeland Security. These agencies have the expertise in applying their risk assessment models to specific situations in order to determine if a facility, including critical infrastructure, is a homeland security facility. However, it is not the Department's intent that these designations will be made by these agencies without the Department's perspective as it relates to the public access purposes of these rules. Therefore, the Department is proposing changes to the definition to provide that the Department, in consultation with the New Jersey Office of Homeland Security and Preparedness, or the United States Department of Homeland Security, will be making the determination as to whether or not a facility is either critical in nature or a key resource.

50. COMMENT: Homeland security facility is defined too broadly. For example, the inclusion of transportation infrastructure as a homeland security facility could be interpreted to include every highway overpass above any waterway. Clearly some types of transportation infrastructure should be considered a homeland security facility. However, further clarification is necessary to distinguish between a train station and an overpass crossing a stream. (59)

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RESPONSE: The Department believes the definition is appropriate, with the proposed change discussed in the prior Response to Comments 48 and 49. Transportation infrastructure is included in the definition as an example of a potential homeland security facility. However, to make it clear that not all transportation infrastructure would be considered a homeland security facility; the Department is proposing a change to qualify the example, “transportation infrastructure” to read “certain transportation infrastructure.”

51. COMMENT: Proposed N.J.A.C. 7:7E-8.11(b) refers to homeland security vulnerability. It is suggested that a definition of “vulnerability” be included in the definition of homeland security facility or in a new definition of “critical infrastructure/key resource site” at N.J.A.C. 7:7E-1.8. (19)

RESPONSE: As discussed in the Response to Comments 48 and 49, the Department is proposing changes to the definition of “homeland security facility” to provide that the Department, in consultation with the New Jersey Office of Homeland Security and Preparedness, or the United States Department of Homeland Security, will be making the determination as to whether or not a facility is either critical in nature or a key resource. In line with that change, the Department is proposing to add the same language to N.J.A.C. 7:7E-8.11(b)5 to clarify that the Department will be making the determination whether a particular site is considered to be vulnerable on a case-by-case basis in consultation with the New Jersey Office of Homeland Security and Preparedness and/or the United States Department of Homeland Security based upon these agencies expertise in applying their risk assessment models to specific situations and

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the Department's perspective as it relates to the public access purposes of these rules. The Department believes that this process is adequately addressed in the rules without a definition of the term "vulnerability."

52. COMMENT: The definition of homeland security facility is supported as it allows the New Jersey Office of Homeland Security and Preparedness and the Federal Department of Homeland Security to apply their risk assessment models to specific situations. However, it is recommended that the definition be expanded to allow for the New Jersey Office of Homeland Security and Preparedness, and the Federal Department of Homeland Security, to apply their risk assessment models to specific "security concern" situations which may otherwise not be captured. Proposed language follows (addition indicated in underlined boldface):

"Homeland security facility means any facility deemed by the New Jersey Office of Homeland Security and Preparedness or the Federal Department of Homeland Security to be either critical in nature or a key resource; **or interdependent, clustering or concentrations of critical infrastructure sites at the discretion of the New Jersey Office of Homeland Security and Preparedness or the Federal Department of Homeland Security.** These facilities may include, but are not limited to, airports and military facilities, transportation infrastructure, and certain chemical or energy facilities and utilities, marine terminal or transfer facilities, and freight or passenger rail lines."

(39)

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RESPONSE: The Department acknowledges the commenter's support for the proposed definition of homeland security facility. However, the Department does not believe it is necessary to expand the definition as suggested. As part of the consultation by the Department with the New Jersey Office of Homeland Security and Preparedness, or the United States Department of Homeland Security, to designate these facilities for purposes of the public access rules, interdependent, clustering, or concentrations of critical or key resources can be considered. It is not necessary to revise the definition to allow for this.

53. COMMENT: The New Jersey Turnpike represents a major route of egress from New York City, providing high speed access from the George Washington Bridge, the Lincoln Tunnel, the Holland Tunnel, and the Goethals Bridge, and the Garden State Parkway serves as a direct north/south coastal evacuation route for much of southern New Jersey during coastal storms, flooding, and wildfires. As such, the New Jersey Turnpike and Garden State Parkway represent infrastructure that is critical to State and Federal economic, transportation, and security concerns. For these reasons, the Turnpike and Parkway should be considered homeland security facilities under the proposed rule. Accordingly, the definition of homeland security facility should be revised as follows (additions underlined):

“‘Homeland security facility’ means any facility deemed by the New Jersey Office of Homeland Security and Preparedness or the Federal Department of Homeland Security to be either critical in nature of a key resource. These facilities specifically include the New

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Jersey Turnpike and the Garden State Parkway and/or the surveyed right-of-ways associated with these roadways, and may include, but are not limited to, airports and military facilities, other transportation infrastructure, and certain chemical or energy facilities and utilities, marine terminal or transfer utilities, and freight or passenger rail lines.” (58)

RESPONSE: While the Department recognizes that portions of these major highways may qualify as homeland security facilities, the Department believes it is appropriate to consult with the New Jersey Office of Homeland Security and Preparedness or the United States Department of Homeland Security in order to make that determination. No changes are proposed to the definition in response to this comment.

54. COMMENT: The New Jersey Turnpike Authority owns and operates large, linear land holdings designated as rights-of-ways, not “parcels,” and owns multiple parcels which comprise the rights-of-way making up both the New Jersey Turnpike and the Garden State Parkway. It is requested that the definition of “parcel” be revised as follows (addition underlined): “Parcel means the totality of all lots and/or rights-of-way under common ownership upon which an existing development is located.” Alternatively, the definition could be revised to read (addition underlined): “Parcel means the totality of all lots under common ownership upon which an existing development is located, including any areas where additional riparian leases or grants may be required to conduct a development.” (19, 58)

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55. COMMENT: According to the proposed rules, if a municipality has an approved Municipal Public Access Plan, all development in that municipality would be subject to the requirements of that plan regardless of whether a neighboring municipality also has an approved Municipal Public Access Plan with different access requirements. This non-uniformity creates significant compliance issues for entities that have projects which can span several municipalities and/or counties. The application of a uniform approach would provide needed certainty as well as accomplish the Department's goals for public access. It is suggested that applicable public access requirements for developments located in municipalities without Municipal Public Access Plans as set forth at proposed N.J.A.C. 7:7E-8.11(n) be made applicable to the Turnpike and Garden State Parkway and their respective rights-of-way in all municipalities. This revision can be effected by amending proposed N.J.A.C. 7:7E-8.11(c)3 as follows (addition underlined):

“In all municipalities, regardless of whether there is a Department approved Municipal Public Access Plan, access shall be provided in accordance with N.J.A.C. 7:7E-8.11(n) for any development located along the lengths of the New Jersey Turnpike and the Garden State Parkway and/or within the surveyed right-of-ways associated with these roadways, N.J.A.C. 7:7E-8.11(o) for marinas...” (58)

RESPONSE TO COMMENTS 54 AND 55: In response to these comments, the Department is proposing to change the rules by adding a new paragraph at N.J.A.C. 7:7E-8.11(n)6 to specifically address public access requirements for superhighways and other public roads. This new language is discussed in further detail in the Response to Comments 124 through 128 below.

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The proposed changes at N.J.A.C. 7:7E-8.11(n)6 obviate any need to modify the definition of “parcel” to include rights-of-way.

56. COMMENT: Defining “parcel” as the size of the property when the development scheme is submitted to the Department and then not requiring access for a development if other property within the property does not require access is too broad. This definition would allow a property owner to buy adjacent property and even if the new development would have, by itself, required access, the newly or recently purchased property would have the same status as the original access-free property. It is suggested that if the parcel definition is changed, a date be struck, such as the effective date of any new rules, stating a parcel is defined as adjacent lots and blocks under common ownership as of the effective date of the rule. (4)

RESPONSE: The proposed definition of “parcel” is “the totality of all lots under common ownership upon which an existing development is located on April 4, 2011.” Thus the issue raised in this comment regarding a date reference in the definition has been addressed. However, the Department has determined that clarifying changes to the definition of parcel are warranted. These changes include the addition of the word “contiguous” to clarify that lots under common ownership must be contiguous to meet the definition of parcel, and the removal of the phrase, “upon which an existing development is located,” because the Department determined that this wording was unnecessary since in all parts of the rule where this limitation is appropriate, the term “parcel” is specified to be the property on which an existing development is located (see, for example, N.J.A.C. 7:7E-8.11(n)1i “... where the proposed activity consists of maintenance,

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rehabilitation, renovation, redevelopment, or expansion that remains entirely within the parcel containing the existing development”). The only place in the rule text that the term “parcel” is used without this qualifying language in the specific provision containing the term is N.J.A.C. 7:7E-8.11(n)1ii; however, the context of that provision makes clear that the parcel is part of a group of contiguous property containing an existing development. Including the term “upon which an existing development is located” in the definition of “parcel” could create unnecessary confusion as to what is intended in subparagraph (n)1ii.

Hudson River Waterfront Area (N.J.A.C. 7:7E-3.48)

57. COMMENT: It is troubling that this rule proposes to restrict access to portions of the Hudson River Walkway. Currently access is provided 24 hours a day but this rule would allow facilities to shut off access to the Walkway outside of normal business hours. The Walkway must remain open 24 hours a day to provide for recreational access when most working families and individuals can utilize the Walkway, after business hours and on weekends. (55)

RESPONSE: The Department appreciates the commenter’s concern and has determined that several changes to the proposed rules are warranted to clarify that public access to and along the main route of the Hudson Waterfront Walkway and on the adjacent piers must still comply with the Hudson Waterfront Walkway Planning and Design Guidelines (1984) and the Hudson Waterfront Walkway Design Standards (1989), pursuant to N.J.A.C. 7:7E-3.48(e), and, in

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accordance with N.J.A.C. 7:7E-3.48(e)1, must be on a 24-hour basis except in certain very limited circumstances.

As proposed at N.J.A.C. 7:7E-8.11(a), it was the Department's intent that, with limited exceptions, public access for the Hudson River waterfront would be governed by N.J.A.C. 7:7E-3.48, the special area rule for the Hudson River waterfront that already establishes unique public access requirements, including the Hudson River Walkway. The only intended proposed exception was for ports and certain existing industrial, public, and homeland security facilities for which public access would not be required, in accordance with proposed N.J.A.C. 7:7E-8.11(n)3i, which governs public access for existing industrial or public development; (n)4i, which governs public access for existing homeland security facilities; and (n)5, which governs public access for ports. As explained in the proposal Summary, the Department therefore proposed cross-references in the Hudson River waterfront special area rule at N.J.A.C. 7:7E-3.48 to those specific portions of the public access rule at N.J.A.C. 7:7E-8.11, with the intent that existing public access must be maintained in all these areas, including the Hudson River waterfront area. However, because proposed N.J.A.C. 7:7E-8.11(n)3i referred the reader to subparagraph (n)3ii, which provides that when public access is required for new industrial development or conversions of existing uses to industrial or public use, it is to be provided during normal operating hours, the inference could be drawn that this allowance applies to the Hudson River waterfront as well, despite the clear and specific direction in existing N.J.A.C. 7:7E-3.48(e)1, noted above, that public access to and along the main route of the Hudson Waterfront Walkway is to be on a 24-hour basis, except in limited circumstances.

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The Department is proposing to make the following changes to clarify the applicability of the public access rules for the Hudson River waterfront special area. At N.J.A.C. 7:7E-8.11(a), the provision stating that public access for the Hudson River waterfront area must be provided in accordance with the special area rule at N.J.A.C. 7:7E-3.48 (except for ports and certain existing industrial, public, and homeland security facilities for which public access is not required in accordance with N.J.A.C. 7:7E-8.11(n)3i, 4i, and 5) is proposed to be deleted. At N.J.A.C. 7:7E-3.48(c), the reference to N.J.A.C. 7:7E-8.11(a), (n)3i, 4i, and 5 is proposed to be deleted for the reasons discussed above. At N.J.A.C. 7:7E-3.50(b), the words, “except for the Hudson River Waterfront Area” are proposed to be deleted as well as the following language, “Public access to lands and waters subject to public trust rights in the Hudson River Waterfront Area shall be provided in accordance with the Hudson River Waterfront Area rule, N.J.A.C. 7:7E-3.48” and, “or with N.J.A.C. 7:7E-3.48 in the Hudson River Waterfront Area”. These changes are necessary since public access along the Hudson River and adjacent piers is proposed to be addressed in N.J.A.C. 7:7E-8.11, and the language in the proposal at N.J.A.C. 7:7E-3.50(b) excluded the Hudson River Waterfront Area from having to comply with N.J.A.C. 7:7E-8.11. At N.J.A.C. 7:7E-8.11(d), which specifies the public access requirements for Municipal Public Access Plans, the Department proposes to add new paragraph (d)2, establishing that Municipal Public Access Plans must require public access along the Hudson River and adjacent piers in the Hudson River waterfront special area consistent with N.J.A.C. 7:7E-3.48(d) and (e). N.J.A.C. 7:7E-3.48(d) specifies the standards that apply to all developments proposed on piers in the Hudson River waterfront area and is used by the Department as a guide for developments proposed on platforms in the Hudson River waterfront area. This subsection includes

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requirements for specific amounts of usable landscaped public open space to be incorporated into projects on piers and platforms and also includes the requirement that at least one public access walkway of a least 16 feet in width be provided along the entire length of a pier, from the waterward end to the landward end at the point at which it abuts the Hudson River Waterfront Walkway. All such walkways shall be at pier deck level or ramped so that disabled access is provided between the public open space areas at both ends of a pier. Pursuant to N.J.A.C. 7:7E-3.48(e), 24-hour public access is required along the main route of the Hudson Waterfront Walkway and adjacent piers unless it can be demonstrated that strict compliance is not practicable based on the risk of injury from substantial permanent obstructions or proposed hazardous operations, or upon documentation of a threat to public safety due to unique circumstances concerning the subject property that would make 24-hour access not feasible. At N.J.A.C. 7:7E-8.11(g), which, as proposed to be changed on adoption, specifies the types of public access that Municipal Public Access Plans shall not require, the Department proposes to recodify paragraph (g)2 as paragraph (g)1 and prohibit Municipal Public Access Plans from providing public access along the Hudson River in the Hudson River waterfront special area that is inconsistent with N.J.A.C. 7:7E-3.48(e). To ensure that it is clear that public access in any municipality that does not have an approved Municipal Public Access Plan must be provided in accordance with the requirements of the Hudson River waterfront special area rule, the Department is proposing to add new N.J.A.C. 7:7E-8.11(n)1ii(1), (n)2iii(3), (n)2iv(1), (n)3ii(1), and (n)4ii(1), which specifically require that public access along the Hudson River and on adjacent piers must be provided in accordance with N.J.A.C. 7:7E-3.48(d) and (e) for

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commercial development, residential development, industrial and public development, and homeland security facilities .

Public access definition (N.J.A.C. 7:7E-8.11(a))

58. COMMENT: Proposed N.J.A.C. 7:7E-8.11(a), which defines public access, references other sections of the rule that may alleviate or preclude the need to provide public access in certain circumstances, but then states that no authorization or approval under this chapter shall be deemed to relinquish public rights of access to and use of lands and waters subject to public trust rights in accordance with N.J.A.C. 7:7E-3.50. This appears to be contradictory and needs clarification. (19)

RESPONSE: Please see the Response to Comment 57, explaining the change the Department is proposing at N.J.A.C. 7:7E-8.11(a) regarding the reference in this subsection to public access for the Hudson River waterfront area. The Department notes that the statement at N.J.A.C. 7:7E-8.11 that no authorization or approval under the coastal zone management rules shall be deemed to relinquish public rights of access to and use of lands and waters subject to public trust rights in accordance with N.J.A.C. 7:7E-3.50 is continued from the existing rules. The statement emphasizes that while the public access rules govern the type and extent of public access the Department will require based on the types and location of proposed development along tidal waters under the Department's jurisdiction pursuant to CAFRA and the waterfront development law, the rules and permits issued under the rules do not relinquish the underlying rights of access

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to tidal waters that are vested in the State in trust for the public according to the Public Trust Doctrine. As indicated in the proposal Summary, the Department's efforts to promote public access, and its promulgation of public access requirements, derive from various authorities, including the Public Trust Doctrine, the Federal Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1531 et seq., as implemented by the State of New Jersey, and the Department's management of the State's coastal areas under the Coastal Area Facility Review Act (CAFRA), N.J.S.A. 13:19-1 et seq., and other statutes.

The Department's rules reflect an attempt to use the authority derived from these various sources to ensure that public access to the water is provided in a comprehensive and consistent manner Statewide. The statement in the rules is intended to make clear that these rules are not intended to provide an interpretation of all rights falling under the Public Trust Doctrine and that the rules do not in any way limit any existing or future rights deemed to be part of the Public Trust Doctrine.

Public access goals

59. COMMENT: Public access should be clearly marked both on and off the beach. (32)

RESPONSE: The rules as proposed require, at N.J.A.C. 7:7E-8.11(t), that public access to tidal waterways must be clearly marked and that Department approved public access signs must be installed and maintained by the permittee and any successors in title and interest in perpetuity at each public accessway, public access area, and/or public parking area. To emphasize and ensure

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that the signage requirement must be met in municipalities with Municipal Public Access Plans, the Department is proposing a change at N.J.A.C. 7:7E-8.11(d) to specifically provide at new paragraph (d)3 that Municipal Public Access Plans must require the installation and maintenance of appropriate public access signage in accordance with N.J.A.C. 7:7E-8.11(t).

60. COMMENT: It is recommended that the Department provide additional details and specifications for boat ramps, piers, fishing, pocket parks, public restrooms, and additional public parking. Applicants and builders should be required to clearly label their public access facilities in perpetuity through conservation easements and legal instruments. As time passes it will be very tempting for businesses, residential property owners, and homeowner associations to take over public access facilities to deny access by visitors or non-patrons. Public access facilities and amenities should be very clearly marked with signs. (37)

RESPONSE: The Department believes that environmental protection and public access policy goals of these rules can be accomplished without extensive prescriptive requirements. Therefore, the Department is not proposing changes to the proposed rules to include additional details and specifications for boat ramps, piers, fishing, pocket parks, public restrooms, and additional public parking. Regarding the second part of the comment concerning labeling public access facilities in perpetuity through conservation easements and legal instruments, proposed N.J.A.C. 7:7E-8.11(y) requires that areas set aside for public access be permanently dedicated for public use through the recording of a Department approved conservation restriction under the New Jersey Conservation Restriction and Historic Preservation Restriction Act, N.J.S.A. 13:8B-1 et

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seq., maintaining the publicly dedicated areas in perpetuity; thus, the issue raised in this comment has been addressed. Regarding signage, the proposed rules do require signs be installed and maintained in perpetuity, and the Department is proposing a change that requires Municipal Public Access Plans to provide for appropriate public access signage in accordance with N.J.A.C. 7:7E-8.11(t).

61. COMMENT: Proposed N.J.A.C. 7:7E-8.11(n)3ii requires public access be provided onsite unless it can be demonstrated that continued public access is not practicable based on the risk of injury from proposed hazardous operations or substantial permanent obstructions and no measures can be taken to avert these risks. This is consistent with the proposed goals at N.J.A.C. 7:7E-8.11(b)4 and 5. Proposed N.J.A.C. 7:7E-8.11(b)4 allows for restrictions on public access so as not to create conditions that may be reasonably expected to endanger public health or safety. Proposed N.J.A.C. 7:7E-8.11(b)5 allows for prohibition of public access where homeland security concerns are present or where it is not practicable based on the risk of injury from hazardous operations or substantial permanent obstructions, and no measure can be taken to avert these risks. "Hazardous operations" should include activities such as high traffic volume that could endanger public health and safety. This could then be used to demonstrate why onsite public access may not be warranted on certain roadways and bridges. (19)

RESPONSE: The Department agrees that high traffic volume could endanger public health and safety, in which case public access might be restricted in the appropriate case and still meet the public access goals at N.J.A.C. 7:7E-8.11(b). The Department notes, as indicated in the Response

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to Comment 50, that portions of major highways may also qualify for reductions in public access as homeland security facilities in appropriate circumstances. Any determination of whether or not the provision of public access could create a significant homeland security vulnerability would be made by the Department in consultation with the New Jersey Office of Homeland Security and Preparedness or the United States Department of Homeland Security on a case-by-case basis. The Department is proposing to change the rules by adding a new paragraph at N.J.A.C. 7:7E-8.11(n)6 to specifically address public access requirements for superhighways and other public roads (see the Response to Comments 124 through 128). The Department believes this proposed change addresses the commenter's concerns in an appropriate manner.

Public access for fishing

62. COMMENT: The removal of N.J.A.C. 7:7E-8.11(l), which specifies that development on or adjacent to tidal waterways and their shores shall incorporate fishing access and associated amenities to the maximum extent practicable, is not supported. Fishing is one of the main points of the Public Trust Doctrine. (4, 17, 43, 46, 54)

63. COMMENT: The proposed rule will remove many existing legal requirements established over the years that have a proven track record in creating and protecting access. Creating and protecting public access has been a long fight, and legal tools to deal with ongoing, chronic problems created over the years, including requirements for the dedication of access and parking for fishing (existing N.J.A.C. 7:7E-8.11(l)). (46, 48)

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64. COMMENT: Being a non-resident who spends 95 percent of his recreational time on New Jersey's beaches, losing fishing access in New Jersey could be devastating. Fishermen love what they do and it keeps them sane. Do not take access away from the fishermen. (24)

65. COMMENT: The DEP must make sure that any regulation that is ultimately adopted does nothing to impede the ability of fishermen to fish. One of the first components of the Public Trust Doctrine is the ability to go down to the water to fish. (3)

66. COMMENT: The State should outline what the town should do in terms of providing and guaranteeing rights to anglers. (44)

67. COMMENT: Public access to beaches and tidal waters is crucially important for recreational anglers. The provision of uniform guidance on public access that is promulgated and enforced by the Department and which is consistent with the Public Trust Doctrine is the most common sense approach to ensuring that the rights of anglers to access tidal waters and marine resources is carried out. (43)

68. COMMENT: According to the U.S. Fish and Wildlife Service, the total economic impact of recreational fishing in New Jersey exceeds \$1.6 billion per year. This impact generates over \$23 million in State sales tax, over \$100 million in total State tax impacts, and supports over 10,000 fulltime jobs. Further, regional salt water anglers 16 and older make on average \$1,151

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per person in total trip and equipment expenditures each year, with approximately \$219.00 on food and lodging, \$137.00 on transportation and \$795.00 directly on fishing equipment and services. This economic activity is generated by recreational anglers fishing from platforms (boats, piers, jetties, docks, and beaches) that all stand to be impacted by the proposed changes to the rule. (43)

69. COMMENT: The main thing fishermen would ask is that the DEP make sure any regulation ultimately adopted does nothing to impede the ability of fishermen to fish. One of the first components of the Public Trust Doctrine has been the ability to go down to the water to fish. (3)

70. COMMENT: The rule should require that residential communities can no longer cede streets or dead-end roads to the owners of the adjacent coastal properties. This is a “loop hole” to prevent access. White Hall Avenue and Roseld Avenue in Deal, Monmouth County were both ceded to the owners of the residential properties bordering the ends of the streets. Despite publicly paid-for rock walls and jetties to protect these residential properties, fishermen no longer have access. (41)

71. COMMENT: The commenter stated that he is an avid surf fisherman who has experienced drastically reduced access to beaches in Cape Cod and beaches along the east coast whenever local officials are given control over them. The Department should not implement any policy that would have the same result in New Jersey. The commenter also stated that he fishes

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at Long Beach Island, Island Beach State Park, Ocean City, Sea Isle City, Wildwood, and Cape May and that he spends thousands of dollars in gear, bait, fuel, and food every year, which supports dozens of businesses in New Jersey. (26)

72. COMMENT: The commenter stated he is a life-long resident of Maryland and that nobody comes to visit the Chesapeake Bay to fish because it is almost impossible to access the Bay's 5,000 miles of shoreline. The commenter stated that he is a surf fisherman that spends his time and money in New Jersey because of the access it has for fishing and that if the rules are implemented he will have to take his business elsewhere. (27)

73. COMMENT: Many of those strong legal requirements that are in the rule now, concerning bridges rebuilt with public money, such as fishing access and parking have been removed. (10)

RESPONSE TO COMMENTS 62 THROUGH 73: The Department agrees that fishing access has long been recognized as an important part of the Public Trust Doctrine and that recreational fishing in New Jersey has a significant positive economic impact on the State. Therefore, in response to these comments, the Department has decided to restore the provision proposed to be deleted at existing N.J.A.C. 7:7E-8.11(l) that required that public access must incorporate, to the maximum extent practicable, fishing access and associated amenities. The Department is proposing to add this requirement to the specific public access goals at N.J.A.C. 7:7E-8.11(b), which public access must be designed to meet. The proposed provision at N.J.A.C. 7:7E-

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8.11(b)3ii also addresses parking to accommodate nighttime fishing. The Department is proposing changes at N.J.A.C. 7:7E-8.11(d) to include a similar provision at paragraph (d)1 to make it clear that municipalities must incorporate fishing and associated amenities, including parking that accommodates nighttime fishing for a reasonable duration of time, in their Municipal Public Access Plans to the maximum extent practicable. Accordingly, the Department would not approve a Municipal Public Access Plan that does not protect existing public access points controlled by the municipality.

74. COMMENT: The majority of fishing in New Jersey is done at night or on the weekends when business people are not working. Restricting public access to normal operating hours would be a huge hindrance to the fishing community. (2)

75. COMMENT: If 24/7 beach access at any of the places the commenters frequent is restricted in any way, they will no longer bring their business to the State. (66)

76. COMMENT: The proposed rules would only require public access during normal operating hours. Apparently the Department believes that the public does not fish on weekends, at night, or in the early morning. (46)

77. COMMENT: The Christie Administration should not lock fishermen out from accessing the beach. It should let them retain their freedom to fish on the beach and jetties 24 hours a day

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seven days a week; and allow them to pursue their love and passion for surf fishing in a respectful and fair manner. (41)

78. COMMENT: There should be provisions to distinguish between the legitimate activities of fishermen and the need to police against illegal activities during normal off hours. (40)

79. COMMENT: The proposed rule should make it clear that public access must be provided for fishing during evening, weekend and early morning hours, not just business hours. (17)

80. COMMENT: In many areas along the waterfront, the public will no longer have 24-hour a day, seven days a week access. The proposed rules allow towns to set public access to areas of the waterfront to “normal business hours.” Therefore fishermen will no longer be able to fish their favorite jetty or beach at 2:00 A.M. during the traditional fall striper run. Fishing for striped bass and other species is best done between the hours of 9:00 P.M. and 4:00A.M. Fishing tournaments along the coast will also be devastated should the 24-hour fishing access be deleted. (41)

81. COMMENT: Many fishing businesses, such as marinas and waterfront tackle shops, are seasonal and, therefore, their normal operating hours vary throughout the year. In addition, fishing activity is most closely linked with tidal cycles and weather patterns which often have no relevance to normal operating hours. (43)

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82. COMMENT: Longport is an example of a place where access for fishermen has been compromised. The Longport Bridge is an awesome location for fishing. A few years ago, it was closed to fishing for safety reasons. After many meetings and objections from fishermen, fishing access was permitted from October 1 through April 30 from the hours of 6:00 P.M. to 6:00 A.M. The reason it was closed for fishing was because the people that lived there wanted to be able to ride their bikes, jog, and walk along the bridge. How are fishermen a safety issue and these other user groups are not? (63)

RESPONSE TO COMMENTS 74 THROUGH 82: In recognition of the commenters' concerns regarding access for fishing during the overnight hours, and as explained in the Response to Comments 62 through 73, the Department is proposing to restore to the rules provisions requiring that public access incorporate, to the maximum extent practicable, fishing access and associated amenities, including parking that accommodates nighttime fishing for a reasonable duration of time.

83. COMMENT: All access points should have parking available within 100 feet or less of the access point. The Department should be responsible for determining the appropriate number of parking spaces at each access point. This is necessary because the fishing tackle required for fighting larger species of fish found in the ocean can be heavy and bulky especially for seniors and children. For example, Sea Bright has an access point on Ocean Avenue but parking is not permitted. (41)

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84. COMMENT: Limiting parking hours to two hours or less is a barrier to fishermen. Two hours or less is not enough time to fish particularly if one is fishing a full moon tide or needs to walk a long distance over rocks or a sandy beach with waders to get to a favorite fishing location. Many fishermen are now using expensive fishing kayaks to launch from the beach and it does not make sense for a kayaker to move the car every two hours. Some towns turn a blind eye to their own parking laws allowing residents and their friends to park unrestricted while fishermen are being ticketed. The rule should provide that restrictions to parking time limits shall not be permitted. In addition, parking fees should not be charged for parking in residential neighborhoods. Parking fees should only be charged in commercially-zoned areas where it can be enforced. (41)

85. COMMENT: Longport has closed many streets off from parking and makes the public walk over a mile to get to the beach to fish. The Department should think about the people who come to the shore for the day or who do not live on these islands but pay taxes. (63)

RESPONSE TO COMMENTS 83 THROUGH 85: In recognition of these commenters' concerns regarding parking for purposes of access to the beach for fishing, and as explained in the Response to Comments 62 through 73, the Department is proposing to restore to the rules provisions requiring that public access incorporate, to the maximum extent practicable, fishing access and associated amenities, including parking that accommodates nighttime fishing for a reasonable duration of time.

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To further address parking concerns, as discussed in the Response to Comments 33 through 43, the Department is proposing to delete the list of public access options from N.J.A.C. 7:7E-8.11(n)1iii and incorporate the list into the public access goals at N.J.A.C. 7:7E-8.11(b)3i, which are applicable to all municipalities, both those with Municipal Public Access Plans and those that do not seek approval of such a plan. This list includes additional public parking to accommodate public access, beyond that needed to support the development to be located on the site. Relocating the list of public access options to N.J.A.C. 7:7E-8.11(b)3i clarifies that the list applies not only to site-specific public access projects, but also to Municipal Public Access Plans. This parking would be available to anyone utilizing public access, including fishermen.

In response to the comment concerning municipalities placing restrictions on parking, proposed N.J.A.C. 7:7E-8.11(e)3iii requires a municipality seeking approval of a Municipal Public Access Plan to include in the application for approval, a public access needs assessment that evaluates existing practical limitations to public access. As discussed in the Response to Comment 86, the Department is proposing to modify the language at N.J.A.C. 7:7E-8.11(e)3iii to make clear that practical limitations to public access include not only a lack of parking, but also restrictions on parking availability, which could limit the public's access to tidal waterways.

86. COMMENT: Towns are no longer required to remove parking restrictions (two-hour limits, no parking zones near access) in order to receive State funding for such projects. Without sufficient parking, public access to the waterfront can be meaningless. (46)

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RESPONSE: In response to this comment, the Department is proposing to modify the language at N.J.A.C. 7:7E-8.11(e)3iii to require municipalities to make clear that practical limitations to public access include not only a lack of parking, but also restrictions on parking availability, such as those described by the commenter, which could limit the public's access to tidal waterways.

Expiration of Municipal Public Access Plans

87. COMMENT: These rules place additional requirements on small towns along the Delaware River. The requirement to update Municipal Public Access Plans every six years is another burden to small towns. The Department should require updates to the plans consistent with the municipal master plan requirements to update plans. Having different updating requirements is costly to municipalities. (53)

88. COMMENT: Expiration of an approved Municipal Public Access Plan after six years, as noted in N.J.A.C. 7:7E-8.11(m), should be revised to make review of the Municipal Public Access Plan concurrent with the municipal master plan reexamination since the approved Municipal Public Access Plan is required to be adopted as part of the municipal master plan. Each municipality's master plan reexamination is on a different schedule but is currently required to occur at least every six years. (25, 47)

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89. COMMENT: The proposal currently states that the Municipal Public Access Plan would be evaluated and readopted every six years as part of the Master Plan; however, recent legislation has modified the Municipal Land Use Law to allow municipalities to readopt their municipal master plans every 10 years instead of six. Therefore, the public and the municipality would only be presented with the opportunity to evaluate, comment on, and hopefully improve their Municipal Public Access Plan every 10 years, much too long of a time frame to ensure adequate access is provided. (55)

90. COMMENT: The Department should provide for more frequent reviews of the implementation of a municipal access plan. The Department should commit to confirm that municipalities are actively implementing their public access plans. If implementation has not commenced or becomes stagnant, the Department should be able to take corrective actions, including, but not limited to, assuming the role of the municipality in plan implementation and/or plan approval revocation. Implementation reviews should occur at least twice a year and should be triggered by applications that are subject to the public access rules. The public's right to access the waterfront is not served by a review occurring once every six years. (46)

RESPONSE TO COMMENTS 87 THROUGH 90: At the time of proposal, the six-year period of validity of the Municipal Public Access Plan was established in order to allow the review of the plan to be performed concurrently with the municipality's review of its master plan. While the Department does not anticipate that noncompliance with Department-approved Municipal Public Access Plans will be a significant issue, it does agree that compliance does need to be

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monitored and a mechanism is necessary to enable the Department to act expeditiously when non-compliance is discovered. In response to these comments, the Department is proposing to delete from N.J.A.C. 7:7E-8.11(m) the six-year expiration date and the requirement for municipalities to renew their Municipal Public Access Plans. Instead, the Department is proposing changes at N.J.A.C. 7:7E-8.11(j)4 to require municipalities to report on the success or failure of their approved plan every five years after the date of adoption of the Municipal Public Access Plan into the municipal Master Plan.

In addition, the Department is proposing to replace proposed N.J.A.C. 7:7E-8.11(m) with a provision establishing a process by which the Department can revoke a Municipal Public Access plan for good cause. Good cause is defined to include failure to implement the Municipal Public Access Plan and/or noncompliance with the Municipal Public Access Plan such as inappropriate expenditure of dedicated Public Access Fund monies for purposes other than public access, conversion of public access sites to other uses, and failure to maintain existing public access and signage. These changes will give the Department the ability to act appropriately in instances of non-compliance.

91. COMMENT: The proposed six-year term for Municipal Public Access Plans at N.J.A.C. 7:7E-8.11(m) is supported. However, the rule should afford municipalities the opportunity to revise the plans sooner to take advantage of opportunities to provide greater public access through property acquisitions for funding assistance programs. Proposed N.J.A.C. 7:7E-8.11(m)1 through 5, which address renewal of Municipal Public Access Plans, is supported (43)

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RESPONSE: The Department acknowledges the commenter's support of proposed N.J.A.C. 7:7E-8.11(m). The Department's intent in proposing the six-year term for Municipal Public Access Plans was to allow municipalities to review the plans at the same time as they reviewed their Municipal Master Plan in accordance with the Municipal Land Use Law, while also providing the Department with a periodic opportunity to review progress toward accomplishing the goals established in the approved Municipal Public Access Plan. However, recent legislation has modified the Municipal Land Use Law to allow municipalities to readopt their municipal master plans every 10 years instead of six. Since the proposed rules require municipalities to adopt Municipal Public Access Plans into their Master Plans, the Department has determined that, rather than setting the plan renewal at a term inconsistent with Master Plan review or extending the term of the plan (and thus the frequency of Department review) to 10 years, it is appropriate to delete the six-year expiration date and the requirement for municipalities to renew their Municipal Public Access Plans proposed at N.J.A.C. 7:7E-8.11(m). Instead, the Department is proposing to amend N.J.A.C. 7:7E-8.11(j)4 to require municipalities to report on the status of accomplishment of their approved plan every five years after the date of adoption of the Municipal Public Access Plan into the municipal Master Plan. Additionally, as referenced in the the Response to Comments 87 through 90 above, the Department is proposing at new N.J.A.C. 7:7E-8.11(m) that the Department may revoke an approved Municipal Public Access Plan for good cause. The Department believes that these changes accomplish an appropriate balance between making the process as efficient as possible for participating municipalities while enabling the Department to monitor progress in accomplishing plan goals and, if necessary, take appropriate action should a municipality be expending public access funds for non-public access

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purposes, taking other inappropriate actions or simply not acting to achieve the goals of the approved plan.

While it is anticipated that the required analyses that are part of the information that must be submitted as part of an application for approval of a proposed Municipal Public Access Plan (including a public access needs assessment and implementation strategy, see N.J.A.C. 7:7E-8.11(e)) will result in plans that do not need to be frequently amended, municipalities are not limited as to when they may propose to amend a plan. In fact, the proposed rules anticipate that approved plans may be periodically amended and specify at N.J.A.C. 7:7E-8.11(l) what types of amendment require Department review and approval.

Enforcement of Municipal Public Access Plans

92. COMMENT: The proposed regulations lack any enforcement mechanism. (22)

93. COMMENT: The proposed rules rely too much on municipal planning and lack enforcement and compliance mechanisms to ensure that access is provided. (55)

94. COMMENT: The Department has not created any oversight or enforcement measures to ensure these plans are implemented so that the promised access actually results. The Department has repeatedly told the public that it has the power to withhold funding and permits from towns that do not properly promote access; but it has not codified those powers in this proposal. The

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Department has entrusted an essential public right to those who have often trampled upon it, and told the public, “Trust us, we’ll keep the towns in line.” (46)

95. COMMENT: The Department must also establish enforcement standards for Municipal Public Access Plans to compel the municipalities to actually implement the plans they develop. (55)

96. COMMENT: The Department claims it possesses tools to compel towns to generate plans that expand access, but the rule contains no enforcement provisions or guidance for the Department to follow when using its implied enforcement mechanisms. As a consequence, any attempt to compel adequate plans would be arbitrary. (31)

97. COMMENT: There is a serious disconnect between the plan approval stage and the plan implementation stage. The rule has no provisions for the Department to oversee or to compel the implementation of a Municipal Public Access Plan, nor does the proposed rule give the Department the power to enforce such plans. (46, 48)

98. COMMENT: The deletion of existing N.J.A.C. 7:7E-8A leaves a gap in enforcement of the rules as no clear method is provided for how municipalities will ensure all rules are met. (8)

99. COMMENT: Even if the idea of these plans was a good one, there are very few enforcement mechanisms in the proposed rules. And there is really no detail as to how the towns

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pay money instead of providing access, how that money is going to be managed or how the public will be assured that such money is used to provide better access in the places where it is needed. (10)

100. COMMENT: Even if a town adopts a beneficial Municipal Public Access Plan, that plan, like so many other municipal land use plans, may not be implemented right away or ever. A well-conceived plan that is never implemented does nothing to promote public access to the waterfront. (46, 48)

101. COMMENT: Proposed N.J.A.C. 7:7E-8.11(i) does not specify the course of action should the Department find a plan inconsistent with that Doctrine. (43)

RESPONSE TO COMMENTS 90 THROUGH 101: As indicated above in the Response to Comments 33 through 43 above, the Department is now proposing to eliminate the six-year term for an approved plan and instead require more frequent progress reporting on a five-year interval at proposed N.J.A.C. 7:7E-8.11(j). Additionally, proposed new N.J.A.C. 7:7E-8.11(m) provides the Department with the ability to revoke an approved Municipal Public Access Plan for good cause. Upon determination that good cause exists, the Department will furnish written notice of its determination to the municipality and will provide to the municipality a 30-day minimum period to correct the noncompliance, explain why the noncompliance cannot be remedied, submit a plan to remedy such noncompliance, or demonstrate that good cause for revocation does not exist. Proposed N.J.A.C. 7:7E-8.11(m)2 provides that, if the requirements are not met, the

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Department will provide the municipality with written notice by certified mail of its intent to revoke the Department's approval of the plan and of the municipality's right to a hearing pursuant to the provisions of N.J.A.C. 7:7-5. Finally, N.J.A.C. 7:7E-8.11(m)3 provides that, if a hearing is not requested within 10 days of receipt of the notice of intent to revoke, the Municipal Public Access Plan shall be revoked. The Department believes that these changes will provide the Department with sufficient ability to ensure compliance with the plans and also afford municipalities a reasonable opportunity to remedy any non-compliance.

Parking for public access

102. COMMENT: In Deal, you are not allowed to park anywhere for more than two hours. Also at the north side of Sea Bright, you really are not able to park. (64)

103. COMMENT: There should not be strict restrictions on parking such as in South Mantoloking, which has a two-hour parking limit. Easy access points and parking should be provided to allow spreading out of crowds on the beaches which contributes to the safety of the public. (54)

104. COMMENT: The Borough of Lavallette has two-hour parking. It was approved by the Department of Transportation. What this has done to the highway is really horrendous. Anyone that would want to utilize the stores now knows they can only park there two hours. So what they are doing is parking on the opposite side of the highway, which is less than 50 feet away, and

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parking from morning till night to go to the beach. There is no public parking required by most businesses, and you have to scramble in order to get to the beach or to park your car. Two-hour parking restrictions should be stopped. (29)

105. COMMENT: In many towns, short parking terms such as 30 minutes have been imposed and in other cases “no parking signs” have appeared. (14)

106. COMMENT: The Department should eliminate “no parking” regulations near the beaches that are designed to limit access to this public trust resource. (17)

107. COMMENT: The proposed rules do not bind towns to any specific requirements for increasing or maintaining parking and other amenities as part of public access. Firm requirements are sorely needed because towns such as Sea Bright, Deal and Long Branch’s Elberon section have taken extra steps to prevent public access by limiting parking to two hours or less or prohibiting parking altogether. (41)

108. COMMENT: Providing a walkover to access the beach without providing parking is meaningless. Providing adequate parking must be considered with any of the access mechanisms identified above. (43)

RESPONSE TO COMMENTS 102 TO 108: The Department agrees that adequate parking, including parking of sufficient duration to allow realistic opportunities for public access, is a

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significant component of public access. In recognition of the importance of parking as a component of public access, the proposed rule at N.J.A.C. 7:7E-8.11(e)3iii requires that an application for approval of a Municipal Public Access Plan include a needs assessment that evaluates existing practical limitations to public access including a lack of restrooms or parking. This provision additionally requires that the municipality submitting the application include an analysis of alternatives to address any limitations determined to exist. To clarify that the Department considers adequate parking to include parking that is not restricted (including restrictions to the duration of parking allowed), the Department is proposing to change this subparagraph to explicitly require the analysis to include restrictions on available parking. In reviewing applications for approval of Municipal Public Access Plans, the Department will be considering whether any restrictions that are in place are reasonable and do not inappropriately limit the public's right to access. The Department is additionally proposing to change the rules as explained further in the Response to Comments 6 through 28 to provide a comment period on a proposed Municipal Public Access Plan submitted to the Department for approval. This will provide the public with an opportunity to identify for the Department any situations, including parking restrictions, that have limited access to tidal waterways and their shores that are not adequately addressed in the proposed plan.

Monetary contribution formula for linear projects

109. COMMENT: A standard formula should be utilized to calculate a payment in lieu of access whether or not a municipality has an approved Municipal Public Access Plan. The

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formula at proposed N.J.A.C. 7:7E-8.11(f) could apply to linear projects. To effect this change, it is suggested that a new paragraph N.J.A.C. 7:7E-8.11(c)4 be inserted stating:

“Notwithstanding the provisions of this section, the public access requirements for development involving applications by the New Jersey Turnpike Authority shall, in all municipalities, be fulfilled using the formula provided for at N.J.A.C. 7:7E-8.11(f). Any Municipal Public Access Plan adopted pursuant to this section shall require that applicants for development by the New Jersey Turnpike Authority shall be fulfilled pursuant to N.J.A.C. 7:7E-8.11(f).” (58)

110. COMMENT: The formula to calculate the amount of a monetary contribution to be made to a Municipal Public Access Plan or equivalent fund needs clarification as to its application to a linear transportation project. It is suggested that alternative calculation be devised for linear projects. (19)

111. COMMENT: Proposed N.J.A.C. 7:7E-8.11(f) calculates the Total Walkway Cost (TWC) and the Land Acquisition Cost (LAC) and adds those values to determine a total monetary contribution. The TWC is calculated by first determining a total square foot area of walkway based, in part, on the length of perpendicular access and length of access to the shoreline. While these values are calculable for a traditional lot of property, they are not applicable to a right-of-way. For roadways, it is suggested that the length of walkway be based on the width of the right-of-way measured perpendicular to the centerline of the roadway that is the subject of the

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application. That width would then be multiplied by 10 feet which is the standard width of a walkway and by the proposed \$7.00 per square foot cost in the current formula to calculate the TWC applicable to a highway project. The LAC for roadway projects is more difficult to formulate because it is based on the assessed value of a property which does not apply to roadway rights-of-way. If the Department wants to include LAC in the formula for rights-of-ways then it is requested that the Department clarify how this would be calculated for highway rights-of way. (58)

112. COMMENT: A fund that could be utilized to meet a public transportation project's public access requirements is supported. The use of a fund would eliminate use of public funds to search for and design offsite public access when onsite public access is prohibitive or not practical due to "substantial permanent obstructions or the risk of injury from proposed hazardous operations." (19)

113. COMMENT: The Department should set up a Statewide Public Access Fund for State agencies much like the No Net Loss Reforestation Act Fund. The No Net Loss Reforestation Act allows direct monetary compensation to the Department; the host municipality can then apply to the Department for the money for tree planting. The same process could be set up for public access finding, thus providing a reasonable and consistent approach to meeting public access requirements by State agencies. If a Statewide Public Access Fund were established as an option, it should be able to be utilized without the burden of demonstration of alternative locations. This would alleviate the need to expend limited public funds in pursuit of an

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alternative offsite location. This would be a more cost-effective approach to reach the goal of providing public access and to satisfy the requirements of the rule. The opportunity to contribute to a Statewide Public Access Fund would also be beneficial in situations where a municipality does not have a Department-approved Municipal Public Access Plan or where a linear transportation project traverses multiple municipalities. The latter scenario could further complicate the public access requirements if each municipality has a Department-approved Municipal Public Access Plan with different public access requirements. A Statewide Public Access Fund is an important alternative approach that would be fiscally responsible for State monies, especially in the current economic situation. (19)

RESPONSE TO COMMENTS 109 THROUGH 113: The Department agrees that clarification is necessary to address how the public access fund calculation would apply to linear projects, including roadways. In response to comments received, the Department is proposing a new N.J.A.C. 7:7E-8.11(f)2 specifying a standard formula to calculate a payment amount for linear projects when a Municipal Public Access Plan requires a monetary contribution to be used to provide new or enhanced public access. The original formula for determining the amount of monetary contribution did not work for rights-of-way because rights-of-way are long linear properties. The LAC cost was not appropriate because rights-of-way are valued differently than residential, commercial or industrial properties. Therefore, the Department is proposing a new formula that identifies the boundaries of the right-of-way to be used to calculate the total walkway cost (TWC). The new formula also accounts for the value of the right-of-way by using the value of adjacent residential, commercial, or industrial properties within one-half mile

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upstream and downstream from the centerline of the right of way to calculate the Land Acquisition Cost. The Department acknowledges that a Statewide Public Access Fund for State agencies modeled after the fund created by the No Net Loss Reforestation Act could be a beneficial means to further enhance public access on a municipal, regional, and Statewide basis. The Department will explore the feasibility of a separate State fund for payments from State agencies, including whether a statutory change is necessary to establish such a fund.

114. COMMENT: Proposed N.J.A.C. 7:7E-8.11(a) describes public access to the waterfront and N.J.A.C. 7:7E-8.11(f) provides a fee calculation to calculate monetary contributions instead of providing access. Frequently utility rights-of-way are located within easements whereby public access cannot be conveyed since the applicant does not own the property. It is recommended that the language within these sections be modified to exempt linear utility facilities such as pipelines or power lines from public access requirements and fees in lieu of access in situations where the permit applicant occupies the right-of-way by an easement. (39)

RESPONSE: The Department does not agree that linear facilities such as pipelines or power lines should be exempt from public access requirements because public access is appropriate when development occurs regardless of whether the development is being proposed by the owner of the property in fee simple or by someone else with the permission of the fee simple owner. While it is true that onsite public access may not always be possible, it is appropriate that these types of linear projects provide public access opportunities. However, as discussed in the Response to Comments 109 through 113 above, the Department does agree that a monetary

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contribution formula is needed to address linear projects and is proposing to add a formula at N.J.A.C. 7:7E-8.11(f)2 for calculating a payment amount for linear projects.

Exclusions from Municipal Public Access Plans (N.J.A.C. 7:7E-8.11(g))

115. COMMENT: Although the port access language is part of proposed N.J.A.C. 7:7E-8.11(n), which pertains only to municipalities that have not adopted an approved Municipal Public Access Plan, proposed N.J.A.C. 7:7E-8.11(g) provides that Municipal Public Access Plans shall not include "...on site public access requirements in excess of those that would be required under this chapter in the absence of an approved Municipal Public Access Plan." Accordingly, it appears that port facilities will be treated the same regardless of whether they are located in a municipality that has or does not have an approved Municipal Public Access Plan. For the purposes of clarity, the rule should refer to offsite access as well as onsite. (28)

116. COMMENT: The commenters oppose the proposed language at N.J.A.C. 7:7E-8.11(g) and (g)1 that states that a Municipal Public Access Plan shall not include onsite public access requirements in excess of those that would be required under the rules in the absence of an approved Municipal Public Access Plan because the exemptions for existing commercial, residential, industrial, homeland security facilities, and marinas would apply even to towns with Municipal Public Access Plans. (46, 48)

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117. COMMENT: Proposed N.J.A.C. 7:7E-8.11(g) limits the ability of the municipality to create its own Municipal Public Access Plan based on what it believes are the appropriate regulations for its own municipality. If the Department is encouraging the creation and use of the Municipal Public Access Plan, it should not then create a clause that limits the Municipal Public Access Plan based on the standard of regulations it highlights later for municipalities without a plan. There is no incentive for a municipality to create a plan because the public access requirements for municipalities without a plan are vague and create too many loopholes for developers to opt out. Proposed N.J.A.C. 7:7E-8.11(g)1 limits a municipality's ability to address any weaknesses with the standard requirements, taking away any incentive for the municipality to go through the costly and time consuming process of creating a master plan element. (38)

118. COMMENT: In the face of overwhelming public opposition to this rule proposal, the Department continues to claim its "goal is to provide better access in more appropriate locations." But the fact that municipalities are prohibited from requiring better access in their plans than the proposed rule requires in towns without a plan in accordance with N.J.A.C. 7:7E-8.11(g)1 is clearly contrary to this stated "goal." (46)

119. COMMENT: Proposed N.J.A.C. 7:7E-8.11(d) provides that a Municipal Public Access Plan shall not provide for access that is contrary to any requirement contained in this chapter. However, proposed N.J.A.C. 7:7E-8.11(g) provides that a Municipal Public Access Plan shall not contain onsite public access requirements in excess of those that would be required under this

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chapter in the absence of an approved Municipal Public Access Plan. It should be clarified that a Municipal Public Access Plan should not have more stringent requirements for onsite or offsite public access. (19)

120. COMMENT: It is requested that N.J.A.C. 7:7E-8.11(g) be amended to state that Municipal Public Access Plans may not require public access for rehabilitation, renovation, and expansion of a current development for which no public access currently exists. (58)

RESPONSE TO COMMENTS 115 THROUGH 120: It was not the Department's intent to require that Municipal Public Access Plans mirror in all cases the standards applicable to municipalities that do not have a Municipal Public Access Plan. Instead, the intent of the proposed language at N.J.A.C. 7:7E-8.11(g) was to not impose a requirement to provide public access at the local level for a type of activity that was exempted at the State level. For example, since the Department has made the determination that it is inappropriate to require new public access solely because an existing facility is performing maintenance activities, the Department will not approve a Municipal Public Access Plan that requires provision of public access or payment into a public access fund for an existing facility in that municipality performing these same maintenance activities.

To clarify that intent in response to these comments, the Department has determined that changes to proposed N.J.A.C. 7:7E-8.11(g) are warranted to more clearly specify what a Municipal Public Access Plan shall not require. These changes will additionally help clarify when municipalities do have the discretion to include in a Municipal Public Access Plan

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submitted for approval, public access requirements different from those that would apply in a municipality that does not have a Department-approved Municipal Public Access Plan. These changes include the replacement of the word “include” with “require” at N.J.A.C. 7:7E-8.11(g) in the lead-in to paragraphs (g)1 through 3, and the deletion of N.J.A.C. 7:7E-8.11(g)1, prohibiting onsite public access requirements in excess of those that would be required under this chapter in the absence of an approved Municipal Public Access Plan, to ensure that municipalities will not impose a requirement to provide public access at the local level for a type of activity that was exempted at the State level. Proposed N.J.A.C. 7:7E-8.11(g)2 will be recodified to N.J.A.C. 7:7E-8.11(g)1 and modified to provide that Municipal Public Access Plans shall not require public access along the Hudson River in the Hudson River Waterfront Area that is inconsistent with N.J.A.C. 7:7E-3.48(e) (that is, the provisions regarding the Hudson Waterfront Walkway) but that elsewhere in the Hudson River Waterfront Area public access is governed by the standards in the public access rule at N.J.A.C. 7:7E-8.11. Proposed N.J.A.C. 7:7E-8.11(g)3 will be recodified to N.J.A.C. 7:7E-8.11(g)2 with a change to harmonize the syntax with the change to the lead-in phrasing at paragraph (g). N.J.A.C. 7:7E-8.11(g)4 will be recodified to N.J.A.C. 7:7E-8.11(g)3, with the same change to harmonize the syntax. At new N.J.A.C. 7:7E-8.11(g)5 through 8, the Department is proposing to complete the list of categories of development for which a Municipal Public Access Plan shall not require public access. These are existing commercial development; existing residential development or new residential development that consists only of a single family home or duplex not in conjunction with prior development; existing industrial or public development; existing homeland security facilities; and existing or new ports. Each provision in the list directs the reader to the applicable provision

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of the public access regulation at N.J.A.C. 7:7E-8.11 that governs public access at the specific type of development.

**Public access requirements in municipalities without Municipal Public Access Plans
(N.J.A.C. 7:7E-8.11(n))**

121. COMMENT: Proposed N.J.A.C. 7:7E-8.11(n)3 explains that if a developer can prove they cannot provide access on their site, and then prove that they cannot provide offsite access within the municipality, they can provide access along the same waterway within a different municipality, as long as the Municipal Public Access Plans are consistent. The rule lists the factors the Department will use to determine if the proposed offsite access is equivalent to the one required onsite, including type, cost, and environmental impact/benefit. It is suggested that these exceptions be removed and replaced with clear, stringent requirements that put the burden on the developer to prove they cannot provide the public's right to waterfront access. Coordination within the municipality to create consistent local requirements is difficult enough; it will be next to impossible to do so with a neighboring municipality. (38)

RESPONSE: The rule as proposed recognizes that there may be situations where onsite access is not feasible, and identified the factors that may justify access being provided offsite. Particularly, offsite access in lieu of onsite access will be allowed where it is demonstrated by the applicant that onsite access is not feasible based on the size of the site, the character of the waterway (such as strong currents or other circumstances that make onsite access undesirable),

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or that there are less environmental impacts or there are environmental benefits to offsite access. The Department believes that these standards that must be proven by the applicant to justify provision of public access offsite are appropriate and notes that the commenter has not suggested any alternate factors that should be considered. As indicated by the commenter, the rule additionally specifies the factors that the Department will utilize if the applicant has proven that onsite access is not feasible to determine if proposed offsite access is equivalent to the access that would have been required onsite. The Department believes that the factors it has identified in the rules as proposed accurately express the type of analysis the Department will conduct to determine if the proposed access is equivalent and that removal of this list of factors that the Department will utilize to make the equivalency determination, as suggested by the commenter, would be inappropriate. However, the Department has determined that it is appropriate to propose changes at N.J.A.C. 7:7E-8.11(n)2iii(2), (n)2iii(3), (n)3iii and (n)4ii to remove “cost” as one of the factors the Department will consider when determining whether the proposed offsite public access is equivalent to that which would have been required onsite. The Department believes this change is warranted because the cost of a public access project can vary widely and inexpensive access can be as suitable as an expensive project; therefore, the Department has determined that “cost” is not a relevant factor in determining whether or not a proposed public access project is acceptable.

Proposed N.J.A.C. 7:7E-8.11(n)3iv states that if an applicant demonstrates to the Department that offsite public access within the same municipality is not feasible because there are no sites available upon which to provide public access, equivalent offsite access shall be provided on the same waterway within a neighboring municipality where access is consistent

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with the neighboring municipality's Municipal Public Access Plan. This subparagraph does not require municipalities to coordinate with neighboring municipalities.

Public access at ports

122. COMMENT: It appears that there is a technical oversight with regard to the public access requirements for port facilities. In the proposal Summary, the Department states, "Since port activities are already providing water access for navigation and commerce, neither existing nor new ports are required to provide public access unless the proposed activities or new port would eliminate existing public access." (See 43 N.J.R. 780, April 4, 2011.) However the rule text at proposed N.J.A.C. 7:7E-8.11(n)5 only addresses existing port facilities. This section should be clarified to provide that both existing and new ports shall not be required to provide public access unless an activity or a new port would eliminate public access. (28)

123. COMMENT: The rule Summary clearly indicates the Department's intent as it pertains to public access at ports. Specifically it states, "Since port activities are already providing water access for navigation and commerce, neither existing ports nor new ports are required to provide public access unless the proposed activities or new port would eliminate existing public access." (See 43 N.J.R. 780, April 4, 2011.) However the language of the rule is somewhat confusing. The rule mentions "practicability" of access as a prerequisite of an access requirement while the Summary of the rule is clear and unambiguous. The language of the rule should reflect the Summary. Accordingly, the rule should be revised to provide that access within ports and

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marine terminals is considered infeasible and is not required unless the activities being regulated would eliminate existing public access. It appears that the language in the rule was unintentionally ambiguous, and the language should be clarified to reflect the Department's position as outlined in the rule Summary. (5)

RESPONSE TO COMMENTS 122 AND 123: In response to these comments, the Department is proposing changes to N.J.A.C. 7:7E-8.11(n)5 to clarify that neither existing nor new ports are required to provide public access except that existing ports must maintain any existing access. The Department has determined that port activities are already providing water access for navigation and commerce. In addition to the above change, the Department is proposing to add language to N.J.A.C. 7:7E-8.11(n)5i(1) to require that, when onsite access is determined to be infeasible, offsite public access must be provided on the same waterway and within the same municipality as the development. This requirement is consistent with the requirement for other types of development in the rule. The Department is additionally modifying N.J.A.C. 7:7E-8.11(n)5i(1) to remove cost as one of the factors to be considered (see the Response to Comment 120).

Public access for transportation projects

124. COMMENT: While it is recognized that the Department has attempted to incorporate safety and security concerns into the proposed rule, in order to avoid confusion, it is recommended that the proposed rule clearly recognize that in the case of New Jersey Turnpike

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Authority highways, public access is restricted by law. Accordingly, the rules should be amended to include a provision which provides that public access to tidal waterways and their shores shall not be required on a superhighway where public access is expressly prohibited by law or regulation. This could be accomplished through the addition of a new paragraph, proposed N.J.A.C. 7:7E-8.11(b)6, which states that “no public access shall be required on superhighways on which public access is restricted by law or regulation.” The term “superhighway” should be defined to include those highways listed at existing N.J.A.C. 7:7E-8.11(b), including the New Jersey Turnpike and the Garden State Parkway. Alternatively, the rule could state that “no public access shall be required in areas restricted by law or regulation, including but not limited to limitations on the use of roadways pursuant to the New Jersey Turnpike Authority regulations at N.J.A.C. 19:9-1.9.” (58)

125. COMMENT: It is requested that for new public developments, N.J.A.C. 7:7E-8.11(n)3ii be clarified to confirm that no onsite public access is required if public access is prohibited by law, such as the New Jersey Turnpike Authority’s prohibition on pedestrian access on the New Jersey Turnpike and Garden State Parkway. It is suggested that this can be accomplished by adding the following phrase at the end of the first sentence of this paragraph: “or where access by the public or pedestrians is prohibited by any law, rule or regulation, including but not limited to N.J.A.C. 19:9-1.9.”

In addition, it is requested that the following sentence be added to the end of N.J.A.C. 7:7E-8.11(n)3iii: “onsite access shall not be required where access by the public or pedestrians is prohibited by any law, rule, or regulation, including but not limited to N.J.A.C. 19:9-1.9.” (58)

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126. COMMENT: Pedestrian access is precluded by regulation for some types of roadways such as interstate highways and bridges. Although the proposed rule does not require public access be provided for rehabilitation or expansion of existing development that remains within the parcel containing the existing development if there is not existing public access, public access would be required for expansion beyond the parcel or for new public development. It does not seem appropriate for a public transportation agency to be required to purchase additional rights-of-way to provide offsite access elsewhere for a roadway that did not allow public access in the first place. (19)

127. COMMENT: There should be an exception to the requirement to provide any public access either onsite or offsite for roadways with controlled access that is, limited access highways such as interstates, freeways, parkways, expressways and other major arterials, since direct access to the transportation facility is limited or controlled as described below:

Control of access: The condition where the rights of owners, occupants or other persons of land abutting a highway to access, light, air or view in connection with the highway are fully or partially controlled by a public agency.

Full control: The condition under which the authority to control access is exercised to give preference to through traffic to a degree, but in addition to interchange connections with selected public roads there may be some intersections at grade.

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Partial control: The condition under which the authority to control access is exercised to give preference to through traffic to a degree that, in addition to access connections with selected public roads, there may be some crossings at grade and some private driveway connections. (19)

128. COMMENT: Transportation projects should not be considered “development” but rather as infrastructure improvement projects. These projects should not be grouped together under the larger category of “development”; this has been a problem in all of the rules. Transportation facilities are different than other types of development and should be treated differently. Roadways are linear facilities with limited rights-of-way (typically narrow corridors) and are subject to more physical constraints than most development projects. New Jersey Department of Transportation money is limited; schedules are well-defined to take advantage of Federal funding; real estate is costly; and taxpayers’ money is being utilized. Most projects involve improvements to existing roadways and bridges. Public transportation infrastructure projects are implemented for the benefit and safety of the traveling public; there is no “profit factor” as is the case with development projects. Another example of why it is not appropriate to include transportation projects with development projects can be found at proposed N.J.A.C. 7:7E-8.11(n)3ii, which refers to providing public access “during normal operating hours.” A roadway or a bridge does not have “normal operating hours” and thus this provision does not apply. (19)

RESPONSE TO COMMENTS 124 THROUGH 128: The Department does not agree that linear transportation projects should be exempt from public access requirements. While it is true that onsite public access may not always be possible, as recognized by the proposed rules, it is

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appropriate that linear projects provide public access opportunities in some manner. However, the Department does agree that public highways are a unique type of development that should be addressed separately from other forms of public development. Accordingly, the Department is proposing changes to N.J.A.C. 7:7E-8.11 to create a separate paragraph at N.J.A.C. 7:7E-8.11(n)6 to address public access requirements for public highways, including superhighways such as the New Jersey Turnpike and the Garden State Parkway.

The Department is proposing to address public access requirements for superhighways at N.J.A.C. 7:7E-8.11(n)6i and the requirements for public highways other than superhighways at N.J.A.C. 7:7E-8.11(n)6ii. In the existing public access rule at N.J.A.C. 7:7E-8.11(f)3, which was proposed for deletion, “superhighway” is defined to mean the Garden State Parkway, New Jersey Turnpike, Atlantic City Expressway, and Interstates 76, 78, 80, 95, 276, 278, 195, 295, and 676. This definition of superhighways will be restored at N.J.A.C. 7:7E-8.11(n)6i. For both superhighways and public highways other than superhighways, the proposed change allows maintenance or rehabilitation within the existing paved constructed development to be conducted without the need to provide additional public access. However, existing public access is required to be maintained; if it cannot be maintained, it must be replaced. If there is no existing public access onsite, no public access is required for superhighways or other public highways.

For superhighways, proposed N.J.A.C. 7:7E-8.11(n)6i(2) and (3) require that expansions of superhighways must provide public access. However, in recognition that new public access on these roadways may be restricted from either a regulatory or practical standpoint, the proposed rule reflects that when public access is required for superhighways, the applicant is not required to look onsite to construct public access facilities. Instead, the applicant must either provide

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offsite public access in the same municipality along the same waterway or, if it demonstrates that public access within the same municipality is not feasible because of the lack of any alternative sites in that municipality, offsite access on the same waterway within a neighboring municipality. Public access for superhighways may be satisfied through a DEP approved Municipal Public Access Plan if one exists or, if one does not exist, public access must be provided in accordance with the public access goals at N.J.A.C. 7:7E-8.11(b) where, as discussed in the Response to Comments 33 through 43, the list of public access options has been moved.

For public highways other than superhighways, as indicated above, maintenance or rehabilitation activity that remains entirely within the paved constructed development may be conducted providing existing public access is maintained or, if such public access cannot be maintained, it must be replaced. However, as the same types of restrictions applicable to superhighways are generally not applicable to these roadways, the Department is proposing at N.J.A.C. 7:7E-8.11(n)6ii(2) that new public highways, including expansions outside the paved constructed development, must provide onsite public access. For these new public highways, offsite public access will only be allowed if the applicant demonstrates that onsite public access is not feasible based on the risk of injury from proposed hazardous operations or substantial permanent obstructions, or upon documentation of a threat to public safety due to unique circumstances concerning the subject property, and no reasonable measures can be taken to avert these risks. This requirement reflects the Department's belief that, absent special circumstances, onsite public access is preferable to offsite access. Proposed N.J.A.C. 7:7E-8.11(n)6ii(3) requires that, where it has been demonstrated that onsite public access is not feasible, equivalent public access must be provided offsite on the waterway(s) and within the municipality(s) where

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the development is located. The proposed offsite access must be consistent with the Municipal Public Access Plan of the municipality in which the development is occurring or, if there is no Municipal Public Access Plan, the access must be located and designed in accordance with N.J.A.C. 7:7E-8.11(b). State and Federal highways are not subject to municipal review; therefore, municipalities cannot impose requirements inconsistent with the rule.

Finally, similar to proposed N.J.A.C. 7:7E-8.11(n)6i(3) for superhighways, proposed N.J.A.C. 7:7E-8.11(n)6ii(4) recognizes that there may be situations where an applicant for a public highway other than a superhighway may not be able to provide offsite public access within the same municipality as where the development is conducted. Where it has been demonstrated that there are no sites available in the same municipality as the project and on the same waterway, proposed N.J.A.C. 7:7E-8.11(n)6ii(4) requires that equivalent offsite public access must be provided on the same waterway(s) within a neighboring municipality. Such public access must be consistent with the neighboring municipality's Municipal Public Access Plan or, if there is no Municipal Public Access Plan, the access must be located and designed to be consistent with N.J.A.C. 7:7E-8.11(b).

129. COMMENT: In certain circumstances, the proposed rule at N.J.A.C. 7:7E-8.11(n)3 and 4 requires public development and homeland security facilities to provide both physical and visual public access. It is suggested that some flexibility be allowed regarding this requirement. It would be beneficial in some cases to have the option of providing visual "and/or" physical access rather than both as currently proposed. To the extent that is possible, the rules should

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provide the opportunity on a case-by-case basis for the reviewer to exercise flexibility based on engineering, adequate justification, practicality and common sense. The Coastal Permit Program rules at N.J.A.C. 7:7-1.10 provide that “the Department may at its discretion and if consistent with statutory requirements, relax the application of any of the procedures in this chapter when necessary and on the public interest.” It is suggested that this language also be included at N.J.A.C. 7:7E, at least for public projects. This would allow some flexibility to take into consideration certain circumstances where providing both types of access may not be appropriate or feasible. (19)

RESPONSE: The applicant has flexibility to choose the type of public access proposed as part of the permit application. These options, which are proposed to be moved to N.J.A.C. 7:7E-8.11(b), include both physical and visual types of access; therefore, the applicant and the reviewer have flexibility in the types of access provided for a project. The rule supports both physical and visual access. However, it also recognizes through the options at N.J.A.C. 7:7E-8.11(b) that both types of access are not always required. The examples allow the use of a walkway as a public access option. Walkways do not necessarily extend down to the water as in cases where there are steep slopes or sidewalks on bridges.

130. COMMENT: Public access requirements applicable to linear projects should be fulfilled through either payment in lieu of access or offsite access requirements. There should be no onsite public access requirements for any new or existing right-of-way on either the Turnpike or the Garden State Parkway. Should a public access obligation be imposed, such obligation should

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be fulfilled by establishing offsite access and/or by making a payment in lieu of providing such access. A payment in lieu of access which is uniform and dedicated to fulfilling public access requirements within any particular municipality is located is preferred. (58)

RESPONSE: As discussed in the Response to Comments 124 through 128, the Department agrees that new public access is not feasible onsite on either the Turnpike or the Parkway and therefore is proposing a new paragraph at N.J.A.C. 7:7E-8.11(n)6 to provide that public access requirements for projects on superhighways may be fulfilled by establishing offsite access and/or by making a monetary contribution if an approved Municipal Public Access Plan with a fund is available. The Department acknowledges that a Statewide Public Access Fund for State agencies modeled after the fund created by the No Net Loss Restoration Act could be a beneficial means to further enhance public access on a municipal, regional, and Statewide basis. The Department will explore the feasibility of a separate State fund for payments from State agencies, including whether a statutory change is necessary to establish such a fund.

Marinas

131. COMMENT: Proposed N.J.A.C. 7:7E-8.11(o)2 defines a new marina for the purposes of this section. The phrase “or, if the marina was not previously permitted because a coastal permit was not required, includes development on a lot or lots which are purchased after April 4, 2011” could create confusion or be misinterpreted as to require public access for existing marinas that are applying for their first permit. For example, public access should not be required at a marina

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that has been in operation for decades which is applying for its first coastal permit. It is requested that the term new marina development under this section be defined and listed separately as follows:

“For new marina development, public access shall be provided onsite during normal operating hours. For the purposes of this subsection, “new marina development” includes:

1. Any change in the existing development that would result in greater than a cumulative 50 percent increase in the area covered by buildings, asphalt, or concrete paving;
2. Proposed development of areas not within the parcel containing the existing development for which a coastal permit was obtained; or
3. If the marina was not previously permitted because a coastal permit was not required, include development on a lot or lots which are purchased after April 4, 2011.” (9)

RESPONSE: Based on this comment, the Department is proposing to change proposed N.J.A.C. 7:7E-8.11(o)2 to not differentiate between properties that have previous permits and those that do not. The Department has determined that this proposed change is consistent with the proposed changes to the definition of “parcel” as discussed in the Response to Comment 56.

132. COMMENT: Proposed N.J.A.C. 7:7E-8.11(o)5 provides that a change in a marina’s operating hours needs to be approved by the Department. It is requested that this section be amended to remove the requirement for approval from the Department and instead require the marina to update its public access plan onsite and provide conspicuous notice of any changes in the normal operating hours for the marina. There may be a situation or an event that could

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potentially change the operating hours for the marina, but would be highly unlikely to have an impact on the general public. Marinas, by the nature of their operations, must be open and accessible to their own customers. It would, however, be extremely difficult for the marina to efficiently operate its business, especially during the boating season and the time of year when the public would most likely want to access the marina, if it needed to wait for Department approval to change or update operating hours. (9, 56)

RESPONSE: Based on the above comments, the Department has determined that changes to proposed N.J.A.C. 7:7E-8.11(o)5 are warranted to remove the requirement for marinas with Department-approved public access plans to obtain approval from the Department to change operating hours. Under the proposed rule, marinas would be required to provide public access during normal operating hours. However, the Department recognizes that there may be a situation or event that could temporarily change the operating hours for the marina, and it would not be practicable or feasible for the marina operator to wait for review and approval from the Department. The Department also recognizes that it is in the best interest of marinas to be open and accessible to their customers, especially during the boating season. Accordingly, the Department believes that removing this requirement from the rule will not have a significant impact on the “normal operating hours” of marinas, and thus public access opportunities, except on rare occasions.

Summary of Agency-Initiated Changes:

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The Department is proposing changes to the rules for the coastal general permits governing development activities related to single-family homes or duplexes at N.J.A.C. 7:7-7.8(g)1, 7.9(g)1, 7.11(c)1, 7.12(c)1, 7.14(b)2, and 7.18(a)11i to delete provisions that state that the Department will not require public access for developments under these general permits so long as no beach and dune maintenance activities are proposed and the site does not include a beach on or adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay, or Delaware Bay or their shores. The deletion is necessary because the provision is not consistent with N.J.A.C. 7:7E-8.11(n)2 as proposed, which governs public access for residential development and provides that for activities at existing residential development any existing public access must be maintained and that for new residential development consisting of a single family home or duplex not in conjunction with a previous development no public access is required.

In the rules for the coastal general permits for development activities relating to single family homes or duplexes at N.J.A.C. 7:7-7.8(g), 7.9(g), 7.11(c), 7.12(c), and 7.18(a)11, the Department is proposing changes to add reference to N.J.A.C. 7:7E-3.50, Lands and waters subject to public trust rights, consistent with the public access provisions in all other coastal general permits at N.J.A.C. 7:7.

The Department is proposing to amend N.J.A.C. 7:7E-8.11(b)4 to eliminate a comma to make clear the Department's intent that access could be restricted for swimmers because of strong currents for public safety reasons; however, fishermen could still fish in strong currents.

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Proposed new N.J.A.C. 7:7E-8.11(n)6ii(2) provides that for new public highways, including expansions outside the paved constructed development, public access shall be provided onsite unless it can be demonstrated that public access is not practicable based on the risk of injury from proposed hazardous operations, or substantial permanent obstructions, or upon documentation of a threat to public safety due to unique circumstances concerning the subject property, and no measures can be taken to avert these risks. Only if it is demonstrated that onsite public access is not possible for one of these reasons does N.J.A.C. 7:7E-8.11(n)6ii(3) provide that the terms of a Department-approved Municipal Public Access Plan would be used to determine public access requirements. Proposed N.J.A.C. 7:7E-8.11(c)1 provides that once the Department has received a resolution incorporating a Department-approved Municipal Public Access Plan into the municipality's Master Plan on or before the date of receipt of a permit application by the Department, public access requirements shall be satisfied in accordance with the Municipal Public Access Plan. Since the Department has determined that public highways, other than superhighways, must first exhaust onsite public access options prior to satisfying public access requirements in accordance with an operational Municipal Public Access Plan, a cross-reference to N.J.A.C. 7:7E-8.11(n)6ii(2) is added to N.J.A.C. 7:7E-8.11(c)1 to reflect that N.J.A.C. 7:7E-8.11(n)6ii(2) creates an exception to the requirement for all public access requirements to be satisfied in accordance with any operational Department-approved Municipal Public Access Plan.

Proposed N.J.A.C. 7:7E-8.11(c)2 provides that in municipalities from which the Department has not received a resolution incorporating a Department-approved Municipal Public Access Plan in

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the municipality's Master Plan on or before the date of receipt of a permit application by the Department, access shall be provided in accordance with N.J.A.C. 7:7E-8.11(n) for commercial, residential, industrial and public development, and for homeland security facilities. The Department is proposing to add "ports" and "Public highways" to this list of development types. Ports is being added to reflect the Department's intention that these facilities be included in the list of types of facilities falling under this paragraph. Public highways is being added to the list because the Department is proposing a new paragraph at N.J.A.C. 7:7E-8.11(n)6 to address public highways.

At N.J.A.C. 7:7E-8.11(d), the phrase, "Municipalities are encouraged to develop and submit to the Department an application for approval of a Municipal Public Access Plan complying with the requirements of (e) through (m) below," is proposed to be deleted from this subsection and the phrase, "Municipalities are encouraged to develop and submit to the Department an application for approval of a Municipal Public Access Plan" is proposed to be added to N.J.A.C. 7:7E-8.11(c). The Department determined that this statement should be at the beginning of the subsection addressing Municipal Public Access Plans instead of in the middle of the subsection.

As a clarifying change, the sentence, "Municipal Public Access Plans shall not provide for access that is contrary to any requirement contained in this chapter (for example, access that encroaches upon threatened or endangered species habitat or is violation of the dunes rules)" is proposed to be deleted from N.J.A.C. 7:7E-8.11(d) and relocated to new N.J.A.C. 7:7E- 8.11(d)4. N.J.A.C. 7:7E-8.11(d)1 through 4 specify general conditions applicable to Municipal Public Access Plans.

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The Department has determined that this standard is most appropriately included as a listed requirement rather than as part of the lead-in language for this subsection.

The Department is proposing to relocate the second sentence in N.J.A.C. 7:7E-8.11(e)3iii to the last sentence of the paragraph as a clarifying change. The first sentence of the proposed paragraph requires a municipality seeking approval of a Municipal Public Access Plan to consider existing practical limitations to public access and the third sentence lists examples of practical limitations. The Department determined that the examples should be listed immediately after the statement requiring the municipality to address practical limitations. N.J.A.C. 7:7E-8.11(e) provides the requirements for a Municipal Public Access Plan implementation strategy. Proposed N.J.A.C. 7:7E-8.11(e)5iii states that a Public Access Fund established in accordance with N.J.A.C. 7:7E-8.11(f) is to be used solely for the development and maintenance of public access, and the development of other municipal programs that ensure reasonable access to the water, and water-dependent and water-oriented activities along all tidal waterways and their shores. The Department's goal is for Public Access Funds to be used for the development of new access and the enhancement of existing access facilities, not for maintenance. Therefore, the Department is proposing to replace "maintenance" with "enhancement" at N.J.A.C. 7:7E-8.11(e)5iii. Similar changes are proposed at N.J.A.C. 7:7E-8.11(f).

The Department has made other changes seeking to clarify the language of the rule without changing the intent of what was originally proposed. Changes include reorganization of wording

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within a section, providing descriptive wording to assist a rule user in understanding cross-references and other changes. These changes are proposed at N.J.A.C. 7:7E-8.11(e)5v, (i), (l), (n), and (n)1ii.

The Department is proposing to add the word "land" to the proposed term "equalized assessed value" in N.J.A.C. 7:7E-8.11(f)1ii and iii for consistency with the term "equalized assessed land value" used in the example calculation contained in this subsection. The contribution calculated under this subsection is based upon the value of land without improvements.

The Department is proposing to amend proposed N.J.A.C. 7:7E-8.11(f)1iii to change the term "water frontage" to "length of the waterfront portion of the property" for consistency with terminology used in proposed N.J.A.C. 7:7E-8.11(f)1i. A similar change is proposed at N.J.A.C. 7:7E-8.11(f)iii where the term "access parallel to shore" which similarly describes the waterfront portion of the property, is proposed to be changed to "waterfront portion of the property" for consistency.

The Department is proposing to amend proposed N.J.A.C. 7:7E-8.11(h) to change "municipality" to "one or more municipalities" to make clear that, if more than two municipalities wish to partner on a joint public access project in their Department-approved Municipal Public Access Plans, that would be allowed under the rules.

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The Department is proposing several changes to proposed N.J.A.C. 7:7E-8.11(i). The Department is proposing to remove the terms "the draft" and "and supporting documents" and add the term "application for approval" which describes both the proposed "draft" Municipal Public Access Plan and the documents submitted in support of it. The term "application for approval" is consistent with how these materials are referred to in other Department submittals. The Department is also proposing to insert the phrase "the broad coastal goals described at" to make clear what is described in N.J.A.C. 7:7E-1.1(c). Finally, the Department is proposing to remove the words "standards and" because the contents of proposed N.J.A.C. 7:7E-8.11(b) are better described as goals.

The Department is proposing to amend proposed N.J.A.C. 7:7E-8.11(k) to change the reference to Department permit to coastal permit. This change is made to better describe public access requirements contained in this chapter as applicable to coastal permits, not all Department permits.

To make clear that the relocation of this list of public access options from N.J.A.C. 7:7E-8.11(n) in no way reduces the applicability of this list to public access provided in accordance with that subsection, the Department is proposing to add a sentence cross-referencing N.J.A.C. 7:7E-8.11(b)3 at N.J.A.C. 7:7E-8.11(n).

It is important that the proposed public access specify both an appropriate type of access for the area and that a sufficient level of access be provided (for example, if fishing access is determined

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to be an appropriate way to satisfy the public access requirement, the Department will additionally need to determine if the size of the access area proposed is adequate). Accordingly, the Department is amending the language in N.J.A.C. 7:7E-8.11(n) to make clear that both the type of access and the amount of access will be part of its review. This change will make this section consistent with proposed changes at N.J.A.C. 7:7E-8.11(o).

The Department is amending various proposed provisions to emphasize that no public access is required for maintenance, rehabilitation, renovation, redevelopment, or expansions. This change is made to proposed N.J.A.C. 7:7E-8.11(n)1i, 2i, 3i, and 4i, and (o)1.

It was the Department's intent to exempt all single family homes and duplexes from the requirement to provide public access. Some readers interpreted the proposed language at N.J.A.C. 7:7E-8.11(n)2iii and iv to require public access for the conversion of an existing non-residential use to one single family home or duplex. Therefore, the Department is proposing to add the clarifying phrase "consisting of more than one single family home or duplex" to N.J.A.C. 7:7E-8.11(n)2iii and iv. The term "total combined water frontage" is proposed to be changed to "total frontage" as water frontage may include areas not subject to public trust rights such as non-tidal waters.

The Department is proposing to add the following language to the criteria used to determine if onsite public access is not practicable, at N.J.A.C. 7:7E-8.11(n)3ii and iii relating to industrial and public development, at N.J.A.C. 7:7E-8.11(n)5i(1) relating to ports, and at N.J.A.C. 7:7E-

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8.11(o)4i relating to marinas: “or upon documentation of a threat to public safety due to unique circumstances concerning the subject property.” This change is similar to the exception language in the proposal at N.J.A.C. 7:7E-3.48(e)1 relating to the Hudson River walkway and will make the exceptions consistent for all types of development and in all areas of the State.

The Department is proposing to change N.J.A.C. 7:7E-8.11(n)5i(1) to make the example provided of factors considered in determining equivalent public access more directly applicable to port facilities. As it is unlikely that existing onsite public access at a port facility will include swimming, the Department is changing the example to existing linear or visual access.

As discussed in response to concerns regarding lack of standards for Municipal Public Access Plans at the Response to Comments 33 through 43, the proposed amendments, as revised through the further changes being proposed at this time, lay out a framework with requirements that must be met both in municipalities with Department-approved Municipal Public Access Plans and those without. Therefore, at N.J.A.C. 7:7E-8.11(o), the Department is proposing to reference N.J.A.C. 7:7E-8.11(b)3 to ensure that the public access options are consistently applied throughout the State. However, recognizing that “one size does not fit all,” the Department is proposing to incorporate language regarding the appropriate access for a site taking into consideration the compatibility of the proposed public access with the applicant’s proposed use of the site, square footage of access area, and environmental impact or benefit. This language is consistent with N.J.A.C. 7:7E-8.11(n). The Department believes these same factors utilized for the types of development addressed in subsection (n) are equally applicable to marinas.

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In proposed N.J.A.C. 7:7E-8.11(p), the Department proposed to list all paragraphs contained in N.J.A.C. 7:7E-8.11(n). With the proposed change to add a new paragraph 6 to subsection (n), rather than add “6” to the string of paragraph numbers contained in subsection (n), the Department is more generally referring to all of subsection (n) by deleting the list of paragraphs.

Effect of Proposed Changes on Impact Statements Included in Original Proposal

The changes to the proposed amendments will in most cases not affect the impact statements or analyses included in the original rule proposal. However, the Department has determined that there are some changes, discussed below, that will have an effect on the analysis contained in the Social and Economic Impact statements included in the original proposal.

Social Impact of Substantial Changes upon Adoption

There are three changes being proposed to N.J.A.C. 7:7E-8.11 that will have positive social impacts. The Department has expanded the provisions at N.J.A.C. 7:7E-8.11(i) regarding its review of proposed Municipal Public Access Plans. These changes will have a positive social impact by enhancing distribution of notice to the public of each application for approval of a Municipal Public Access Plan, as well as provide the public easier access to the proposed Municipal Public Access Plan through posting of the proposed plan on the Department’s website

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and an opportunity to comment on the proposed Municipal Public Access Plan prior to the Department making a decision on the application.

The Department is also proposing to add N.J.A.C. 7:7E-8.11(b)3ii, which requires public fishing access and related amenities to be provided as part of proposed public access to the maximum extent practicable. This requirement will have a positive social impact by encouraging fishing access for residents and the general public at all public access locations since fishing access has long been recognized as an important part of the Public Trust Doctrine.

The Department is also proposing changes at N.J.A.C. 7:7E-8.11(j)4 that eliminate the expiration of Municipal Public Access Plans after six years and replacing it with a requirement for municipalities to report on the successes or failure of their approved plan. This change will have a positive social impact by providing the public, municipalities, and the Department with an update on the success or failure of the plans every five years. It will also eliminate the necessity for municipalities to resubmit their plans for approval every six years, as originally proposed, thereby eliminating Department reviews and the expense of municipal resubmissions. Furthermore, the addition of a provision allowing the Department to revoke approval of a Municipal Public Access Plan for good cause at N.J.A.C. 7:7E-8.11(m) will also have a positive social impact by assuring that the Department is able to act appropriately to protect public access rights if it is determined that a municipality is inappropriately spending public access funds for other purposes or is not otherwise implementing the approved plan.

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Economic Impact of Substantial Changes on Adoption

No significant economic impacts are anticipated to result from the substantial changes on adoption. However, several modest beneficial impacts are likely. One change will have a positive economic impact on public highway authorities as well as State and county transportation agencies. Proposed N.J.A.C. 7:7E-8.11(n)6 specifies the requirements for super highways and other public highways. The proposed new language, by recognizing access cannot be provided on limited access roadways, will eliminate the need to address onsite access in project-specific plans for these types of projects. The Department also proposes changing the formula for calculating the monetary contribution option for linear projects at N.J.A.C. 7:7E-8.11(f)2. This change will have a positive economic impact because it provides a formula for linear projects that is specific to linear projects and recognizes that access for a linear project is different from public access at a commercial, industrial, or residential project. The new formula allows linear projects to use the value of adjacent properties to calculate their monetary contribution in place of the value of the right-of-way or easement itself. This should result in more realistic and appropriate values of public access obligation, while simultaneously reducing the resources required of project sponsors to determine the estimates.

The Department is also proposing changes regarding the coastal general permit for beach and maintenance activities. As of three years from the effective date of these amendments, the Department will not approve an authorization to a municipality under the general permit unless the municipality has a Department-approved Municipal Public Access Plan. This change

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establishes a reasonable period of time for municipalities to develop their public access plans before the general permit for beach and maintenance activities becomes unavailable to them and they will have to instead apply for and obtain an individual CAFRA permit for beach maintenance. Since preparing and applying for a CAFRA individual permit is more costly than preparing and applying for a coastal general permit, this phased-in approach provides an opportunity for municipalities to obtain an appropriate permit at a slightly lower cost.

Full text of the proposed substantial changes to the proposed amendments follows (additions to proposal indicated in italicized boldface ***thus***; deletions from proposal indicated in italicized cursive brackets {thus}):

CHAPTER 7

COASTAL PERMIT PROGRAM RULES

7:7-7.6 Coastal general permit for beach and dune maintenance activities

(a) This coastal general permit authorizes beach and dune maintenance activities *{by municipal applicants with Department-approved municipal public access plans, in accordance with N.J.A.C. 7:7E-8.11(c) through (m), or by non-municipal applicants}* provided:

1.- 3. (No change from proposal.)

(b) (No change.)

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(c) As of (three years after the effective date of this subsection), the Department shall not approve authorization under this general permit to any municipality that does not have a Department-approved municipal public access plan in accordance with N.J.A.C. 7:7E-8.11(c) through (m).

7:7-7.8 Coastal general permit for the development of a single family home or duplex

(a) - (f) (No change.)

(g) {Except as provided in (g)1 below, public} **Public** access shall be provided in accordance with *the public trust rights rule, N.J.A.C. 7:7E-3.50, and* the public [trust rights] **access** rule, N.J.A.C. 7:7E-8.11. [Additional requirements may be imposed as a condition of Shore Protection Program funding, pursuant to N.J.A.C. 7:7E-8.11(p).]

{1. In accordance with N.J.A.C. 7:7E-8.11[(f)6], the Department shall not require public access for the development under this coastal general permit provided no beach and dune maintenance activities are proposed and the site does not include a beach on or adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay or their shores. This provision does not apply to the Hudson River Waterfront Area at N.J.A.C. 7:7E-3.48. }

(h) - (o) (No change.)

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7:7-7.9 Coastal general permit for the expansion, or reconstruction (with or without expansion), of a single family home or duplex

(a) - (f) (No change.)

(g) {Except as provided in (g)1 below, public} **Public** access shall be provided in accordance with *the public trust rights rule, N.J.A.C. 7:7E-3.50, and* the [Public trust rights] **public access** rule, N.J.A.C. 7:7E-8.11. [Additional requirements may be imposed as a condition of Shore Protection Program funding, pursuant to N.J.A.C. 7:7E-8.11(p).]

{1. In accordance with N.J.A.C. 7:7E-8.11[(f)6], the Department shall not require public access for the development under this coastal general permit provided no beach and dune maintenance activities are proposed and the site does not include a beach on or adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay or their shores. This provision does not apply to the Hudson River Waterfront Area at N.J.A.C. 7:7E-3.48.}

(h) - (o) (No change from proposal.)

7:7-7.11 Coastal general permit for the construction of a revetment at a single family home or duplex lot

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(a) - (b) (No change from proposal.)

(c) {Except as provided in (c)1 below, public} **Public** access shall be provided in accordance with *the public trust rights rule, N.J.A.C. 7:7E-3.50, and* the [Public trust rights] **public access** rule, N.J.A.C. 7:7E-8.11. [Additional requirements may be imposed as a condition of Shore Protection Program funding, pursuant to N.J.A.C. 7:7E-8.11(p).]

{1. In accordance with N.J.A.C. 7:7E-8.11[(f)6], the Department shall not require public access for the development under this coastal general permit provided no beach and dune maintenance activities are proposed and the site does not include a beach on or adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay or their shores. This provision does not apply to the Hudson River Waterfront Area at N.J.A.C. 7:7E-3.48.}

(d) (No change.)

7:7-7.12 Coastal general permit for the construction of gabions at a single family/duplex lot

(a) - (b) (No change.)

(c) {Except as provided in (c)1 below, public} **Public** access shall be provided in accordance with *the public trust rights rule, N.J.A.C. 7:7E-3.50, and* the [Public trust rights] **public access**

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rule, N.J.A.C. 7:7E-8.11. [Additional requirements may be imposed as a condition of Shore Protection Program funding, pursuant to N.J.A.C. 7:7E-8.11(p).]

{1. In accordance with N.J.A.C. 7:7E-8.11[(f)6], the Department shall not require public access for the development under this coastal general permit provided no beach and dune maintenance activities are proposed and the site does not include a beach on or adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay or their shores. This provision does not apply to the Hudson River Waterfront Area at N.J.A.C. 7:7E-3.48.}

(d) (No change.)

7:7-7.14 Coastal general permit for reconstruction of a legally existing functioning bulkhead

(a) (No change.)

(b) The reconstruction of a legally existing bulkhead as described in (a) above is acceptable provided that:

1. (No change.)

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2. {Except as provided in (b)2i below, public} **Public** access shall be provided in accordance with the lands and waters subject to public trust rights rule, N.J.A.C. 7:7E-3.50, and the public [trust rights] **access** rule, N.J.A.C. 7:7E-8.11. [Additional requirements may be imposed as a condition of Shore Protection Program funding, pursuant to N.J.A.C. 7:7E-8.11(p).]

{i. In accordance with N.J.A.C. 7:7E-8.11[(f)6], the Department shall not require public access for the development under this coastal general permit provided no beach and dune maintenance activities are proposed and the site does not include a beach on or adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay or their shores. This provision does not apply to the Hudson River Waterfront Area at N.J.A.C. 7:7E-3.48.}

3. - 7. (No change.)

(c) (No change.)

7:7-7.18 Coastal general permit for bulkhead construction and placement of associated fill

(a) This coastal general permit authorizes the construction of a bulkhead and associated fill at a single family/duplex lot on a natural water body provided that the proposed bulkhead complies with the following:

1. - 10. (No change.)

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11. {Except as provided in (a)11i below, public} **Public** access shall be provided in accordance with *the public trust rights rule, N.J.A.C. 7:7E-3.50, and* the public [trust rights] **access** rule, N.J.A.C. 7:7E-8.11. [Additional requirements may be imposed as a condition if Shore Protection Program funding is utilized, pursuant to N.J.A.C. 7:7E-8.11(p).]

{i. In accordance with N.J.A.C. 7:7E-8.11[(f)6] , the Department shall not require public access for the development under this coastal general permit provided no beach and dune maintenance activities are proposed and the site does not include a beach on or adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay or their shores. This provision does not apply to the Hudson River Waterfront Area at N.J.A.C. 7:7E-3.48. }

(b) - (c) (No change.)

CHAPTER 7E

COASTAL ZONE MANAGEMENT

7:7E-1.8 Definitions

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[(a)] The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

...

“Homeland security facility” means any facility deemed by the *Department in consultation with the New Jersey Office of Homeland Security and Preparedness or the {Federal} United States Department of Homeland Security to be either critical in nature or a key resource. These facilities may include, but are not limited to, airports and military facilities, certain transportation infrastructure, and certain chemical or energy facilities and utilities, marine terminal or transfer facilities, and freight or passenger rail lines.*

...

“Parcel” means the totality of all *contiguous* lots under common ownership *{upon which an existing development is located}* on April 4, 2011.

...

7:7E-3.48 Hudson River Waterfront Area

(a) - (b) (No change.)

(c) Hudson River Waterfront Area development shall be consistent with all other applicable Coastal Zone Management rules with particular attention given to N.J.A.C. 7:7E-3.40, Public open space, N.J.A.C. 7:7E-3.41, Special hazards areas, N.J.A.C. 7:7E-3.43, Special urban areas,

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N.J.A.C. 7:7E-3.50, Lands and waters subject to public trust rights, N.J.A.C. 7:7E-7.14, High rise structures, N.J.A.C. 7:7E-8.11, Public [trust rights] **access**, *{specifically N.J.A.C. 7:7E-8.11(a), (n)3i, 4i and 5,}* N.J.A.C. 7:7E-8.12, Scenic resources and design, and N.J.A.C. 7:7E-8.4, Water quality.

(d) – (f) (No change from proposal.)

7:7E-3.50 Lands and waters subject to public trust rights

(a) (No change from proposal.)

[(b) Development that adversely affects lands and waters subject to public trust rights is discouraged.]

(c) In accordance with the moratorium imposed under the Public Access and Marina Safety Task Force Act, N.J.S.A. 13:19-38 et seq., the requirements of this section shall not apply to marinas until January 1, 2011.]

[(d)] **(b) [Public] {Except for the Hudson River Waterfront Area, public} Public** access to lands and waters subject to public trust rights shall be provided in accordance with the public [trust rights] **access** rule, N.J.A.C. 7:7E-8.11. **{Public access to lands and waters subject to public trust rights in the Hudson River Waterfront Area shall be provided in accordance with the Hudson River Waterfront Area rule, N.J.A.C. 7:7E-3.48.}** Development that does

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not comply with N.J.A.C. 7:7E-8.11, Public access, /or with N.J.A.C. 7:7E-3.48 in the Hudson River Waterfront Area,/ is discouraged in lands and waters subject to public trust rights.

[(e)] (c) (No change from proposal.)

7:7E-8.11 Public [trust rights] **access**

[(a) Public trust rights to tidal waterways and their shores (public trust rights) established by the Public Trust Doctrine include public access which is the ability of the public to pass physically and visually to, from and along lands and waters subject to public trust rights as defined at N.J.A.C. 7:7E-3.50, and to use these lands and waters for activities such as swimming, sunbathing, fishing, surfing, sport diving, bird watching, walking and boating. Public trust rights also include the right to perpendicular and linear access. Public accessways and public access areas provide a means for the public to pass along and use lands and waters subject to public trust rights.]

(a) Public access to the waterfront is the ability of the public to pass physically and visually to, from, and along tidal waterways and their shores and to use such shores, waterfronts and waters for activities such as navigation, fishing, and recreational activities including, but not limited to, swimming, sunbathing, surfing, sport diving, bird watching, walking, and boating. Public accessways and public access areas include streets, paths, trails, walkways, easements, paper streets, dune walkovers/walkways, piers and other rights-of-

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way. {Public access for the “Hudson River Waterfront Area” shall be provided in accordance with N.J.A.C. 7:7E-3.48 except for ports and certain existing industrial, public, and homeland security facilities for which access is not required in accordance with N.J.A.C. 7:7E-8.11(n)3i, 4i and 5.} No authorization or approval under this chapter shall be deemed to relinquish public rights of access to and use of lands and waters subject to public trust rights in accordance with N.J.A.C. 7:7E-3.50. Further, no authorization or approval under this chapter shall be considered a Tidelands approval or shall exempt an applicant from the obligation to obtain a Tidelands approval, if needed.

[(b) When used in this section, the following words and terms have the following meanings, unless the context clearly indicates otherwise:

"Green Acres funding" means a loan or matching grant, or both, to a local government unit, or a matching grant to a nonprofit, for the acquisition of land or the development of outdoor recreation and conservation facility(ies) provided by the Department's Green Acres Program in accordance with N.J.A.C. 7:36.

"Held" when used with reference to land means owned, leased, or otherwise controlled.

"Natural area" means an area that has retained its natural character, as evidenced by the presence of woody vegetation (trees, saplings, scrub-shrub vegetation) or rare or endangered plants. A disturbed area may be considered a natural area if such vegetation is present. A natural area does not include maintained lawns or areas landscaped with non-native herbaceous plants.

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"Paper street" means the street shown on a recorded plan but never built.

"Public accessway" means a route that provides a means for the public to reach, pass along, and/or use lands and waters subject to public trust rights. Public accessways include streets, paths, trails, walkways, easements, paper streets, dune walkovers/walkways, piers and other rights-of-way.

"Shore Protection Program funding" means monies from the Shore Protection Fund established by N.J.S.A. 13:19-16 and any other Department money provided for shore protection projects associated with the protection, stabilization, restoration or maintenance of the shore and adjacent land, including beach nourishment projects and land acquisitions. A State Aid Agreement is the means by which a municipality participates in Shore Protection Program funding.

"State Aid Agreement" means a cost sharing agreement entered into by the Department and a municipality for the construction of a shore protection or beach nourishment project. The State Aid Agreement shall describe the project and project area for purposes of compliance with (p)7ii through vi and (p)8ii through v below in recognition of the phasing of a large-scale or multi-phase shore protection or beach nourishment project.

(c) In accordance with the moratorium imposed under the Public Access and Marina Safety Task Force Act, N.J.S.A. 13:19-38 et seq., the requirements of this section shall not apply to marinas until January 1, 2011. Prior to January 1, 2011 marinas shall be subject to the requirements of this section in effect as of December 16, 2007, incorporated by reference herein as chapter Appendix 6.

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(d) Except as otherwise provided at (f) below, development on or adjacent to all tidal waterways and their shores shall provide onsite, permanent, unobstructed public access to the tidal waterway and its shores at all times, including both visual and physical access. Specific requirements for sites located along the Arthur Kill, Kill Van Kull west of Bayonne Bridge, Newark Bay, Delaware River from the Trenton Makes Bridge to the CAFRA boundary, Elizabeth River, Hackensack River, Passaic River, Rahway River, Raritan River, Cohansey River in Bridgeton City, and Maurice River in Millville City are found at (e) below. Public accessways and public access areas shall:

1. Include perpendicular access and a linear area along the tidal waterway and its entire shore; and

2. If located in a natural area of a tidal waterway, be designed to minimize the impacts to the natural area and tidal waterway including impacts to habitat value, vegetation and water quality.

(e) Except as provided in (f) below, in addition to the requirements of (d) above, the perpendicular access and linear area provided for sites located along the Arthur Kill, Kill Van Kull west of Bayonne Bridge, Newark Bay, Delaware River from the Trenton Makes Bridge to the CAFRA boundary, Elizabeth River, Hackensack River, Passaic River, Rahway River, Raritan River, Cohansey River in Bridgeton City, and Maurice River in Millville City, shall comply with the following. The standards for public access along the Hudson River Waterfront Area are set forth at N.J.A.C. 7:7E-3.48.

1. The linear area shall consist of a walkway that meets the following:

- i. The minimum width of walkway free of obstruction shall be 16 feet; and

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ii. An area a minimum of 30 feet wide, including the walkway area, shall be permanently protected by a conservation restriction; and

2. The perpendicular access shall consist of a walkway that meets the following:

i. The minimum width of the walkway free of obstruction shall be 10 feet;

ii. An area a minimum of 20 feet wide, including the walkway area shall be permanently protected by a conservation restriction; and

iii. The linear distance between perpendicular accessways shall not exceed one-half mile as measured generally parallel to the waterway; and

3. The Department may reduce the walkway width requirements at (e)1i and 2i above, as necessary to protect endangered and threatened wildlife or vegetation species habitat, critical wildlife habitat as defined at N.J.A.C. 7:7-3.39 , natural areas or existing infrastructure.

(f) The permanent onsite public access required at (d) and (e) above may be modified in the following circumstances. However, in no case shall such modification constitute permanent relinquishment of public trust rights of access to and use of tidal waterways and their shores.

1. Public access to tidal waterways and their shores shall be available at all times. However, the Department may allow closure of an area otherwise available for public access during specified late night hours upon documentation of unique circumstances, other than the risk associated with tidal waterways, that threaten public safety and warrant such closure. In no case shall physical barriers be used to close public access. This exception does not apply to the Hudson River Waterfront Area or to the waterways listed in (e) above;

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2. The Department may allow, require or impose temporary restrictions to public access, including closure of an area otherwise subject to public access, when it determines:

i. Exigent circumstances of public safety or security, or repair, maintenance, or construction relating to any public access infrastructure such as a walkway or boardwalk exist, with such closure to terminate immediately when such exigent circumstances cease to exist;

ii. Restrictions are necessary to protect endangered or threatened wildlife or plant species from disturbance or destruction; or

iii. Restrictions are necessary to protect other critical wildlife resources such as seasonal assemblages of wildlife in areas that provide critical feeding, roosting, resting or staging habitat;

3. Where development of a new or at an existing energy facility, industrial use, port use, airport, railroad, military facility, or superhighway is proposed and the Department determines that perpendicular access and/or a linear area along the entire shore of the tidal waterway at the site is not practicable based on the risk of injury from existing or proposed hazardous operations, or substantial existing and permanent obstructions, and no measures can be taken to avert these risks, public access shall be provided in accordance with (f)3i or ii below. For the purposes of this paragraph, "superhighway" shall mean the Garden State Parkway, New Jersey Turnpike, Atlantic City Expressway, and Interstates 76, 78, 80, 95, 276, 278, 195, 295, and 676.

i. The linear public access that would be required in accordance with (d) above on site shall be reconfigured and enhanced to accommodate such structures and address such risks; or

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ii. If public access on site is not practicable in accordance with (f)3i above, alternate public access of comparable use to the public shall be provided at a nearby offsite location;

4. Where development of a new or at an existing two-unit (excluding duplexes) or three-unit residential development, or associated accessory development or associated shore protection structure is proposed, the Department may allow the provision of alternate public access onsite or at a nearby offsite location based on an evaluation of the size of the site, the character of the waterway, and environmental impact or benefits, provided (f)4i through iii below are met. This paragraph does not apply to the Hudson River Waterfront Area and the waterways listed at (e) above. Public access requirements may be imposed as a condition of Shore Protection Program funding, pursuant to (p) below.

i. The development does not result in the development of more than three residential units either solely or in conjunction with a previous development as defined at N.J.A.C. 7:7-2.1(b)8;

ii. No beach and dune maintenance activities are proposed; and

iii. The site is not located on or adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay and their shores;

5. Where development of a new or at an existing two-unit or three-unit (excluding duplexes) residential development, or associated accessory development, or associated shore protection structure is proposed that meets (f)4i above and is located on a site that is located along the Arthur Kill, Kill Van Kull west of Bayonne Bridge, Newark Bay, Delaware River from the Trenton Makes Bridge to the CAFRA boundary, Elizabeth River, Hackensack River, Passaic River, Rahway River, Raritan River, Cohansey River in Bridgeton City, and Maurice River in

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Millville City, linear and perpendicular public access shall be provided in accordance with the following:

i. The linear area shall consist of a walkway, that meets the following:

(1) The minimum width of walkway free of obstruction shall be 10 feet; and

(2) An area a minimum of 20 feet wide, including the walkway area shall be permanently protected by a conservation restriction; and

ii. The perpendicular access shall consist of a walkway that meets the following:

(1) The minimum width of the walkway free of obstruction shall be 10 feet;

(2) An area a minimum of 10 feet wide, including the walkway area shall be permanently protected by a conservation restriction;

6. Except as provided in (f)7 below, the Department shall not require public access where development of a new or at an existing single family home, duplex, or associated accessory development or associated shore protection structure is proposed, provided (f)6i through iii below are met. Public access requirements may be imposed as a condition of Shore Protection Program funding, pursuant to (p) below. This paragraph does not apply to the Hudson River Waterfront Area at N.J.A.C. 7:7E-3.48.

i. The development does not result in the development of more than one single family home or duplex either solely or in conjunction with a previous development as defined at N.J.A.C. 7:7-2.1(b)8;

ii. No beach and dune maintenance activities are proposed; and

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iii. The site does not include a beach on or adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay and their shores;

7. Where development of a new or at an existing single family home, duplex, or associated accessory development, or associated shore protection structure is proposed that meets (f)6i above and is located on a site that includes a beach on which beach and dune maintenance activities are proposed or a beach on or adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay and their shores, public access along and use of the beach and the shore shall be provided. Additional requirements may be imposed as a condition of Shore Protection Program funding, pursuant to (p) below; or

8. Where development impacting a facility subject to a Federal or State homeland security statutory scheme is proposed and the Department determines, upon consultation with the Office of Homeland Security and Preparedness, that perpendicular public access and/or a linear public access area along the entire shore of the tidal waterway is not practicable because it poses an unacceptable homeland security risk:

i. The linear public access that would be required in accordance with (d) above on site shall be reconfigured and enhanced to address such homeland security risk; or

ii. If public access on site is not practicable in accordance with (f)10i above, alternate public access of comparable use to the public shall be provided at a nearby off site location.]

(b) In addition to the broad coastal goals outlined at N.J.A.C. 7:7E-1.1(c), public access shall be provided in a manner designed to achieve the following *public access goals*:

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1. – 2. (No change from proposal.)

3. New development shall provide opportunity for public access to tidal waterways and their shores on or offsite;

i. Public access proposed by an applicant may include any one or combination of the following:

(1) A public accessway designed in accordance with (w) below, located parallel to the shoreline with perpendicular access;

(2) A boat ramp, pier, fishing, or other direct access to the waterway;

(3) A waterfront pocket park;

(4) Public restrooms to accommodate those utilizing public access; and/or

(5) Additional public parking to accommodate those utilizing public access;

ii. Public access proposed by an applicant shall incorporate, to the maximum extent practicable, fishing access and associated amenities, including parking that accommodates nighttime fishing for a reasonable duration of time, on or adjacent to tidal waterways and their shores. In the case of a beach, fishing access shall not be required in areas designated for swimming during hours designated for swimming.

4. Public access to tidal waterways and their shores shall be provided in such a way that it shall not create conditions that may be reasonably expected to endanger public health or safety, or damage the environment. To that end, public access may be restricted

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seasonally, hourly, or in scope (for example, access restricted to a portion of the property, or access allowed for fishing{,} but not swimming due to consistent strong currents); and

5. Public access to tidal waterways and their shores shall be provided in such a way that it shall not create a significant homeland security vulnerability, *as determined by the Department in consultation with the New Jersey Office of Homeland Security and Preparedness or the United States Department of Homeland Security.* Therefore, public access may be prohibited in locations where homeland security concerns are present or where it is not practicable based on the risk of injury from hazardous operations or substantial permanent obstructions, and no measures can be taken to avert these risks.

(c) Development proposed on sites which are located on or adjacent to tidal waterways and their shores shall provide public access *in accordance with (c)1 through 3 below.* {Public access in the Hudson River Waterfront Area, as described at N.J.A.C. 7:7E-3.48(a), shall be provided in accordance with N.J.A.C. 7:7E-3.48. Public access for development in other areas shall be provided as follows:} *Municipalities are encouraged to develop and submit to the Department an application for approval of a Municipal Public Access Plan.*

1. In municipalities *from which {have received Department approval of a Municipal Public Access Plan in accordance with (d) through (m) below} the Department has received a resolution incorporating a Department-approved Municipal Public Access Plan into the municipality's Master Plan in accordance with (k) below* on or before the date of receipt of a

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permit application by the Department, public access requirements shall be satisfied in accordance with the Municipal Public Access Plan, *except in accordance with N.J.A.C. 7:7E-8.11(n)6ii(2)*;

2. In municipalities *{that do not have an approved Municipal Public Access Plan}* from which the Department has not received a resolution incorporating a Department-approved Municipal Public Access Plan into the municipality's Master Plan in accordance with (k) below on or before the date of receipt of a permit application by the Department, access shall be provided in accordance with (n) below, for commercial, residential, industrial and public development, and for homeland security facilities, *ports, and public highways*. Coastal permit applications shall include a project specific access plan that provides for public access in accordance with all applicable requirements; and

3. In all municipalities, regardless of whether *{there is a Department approved Municipal Public Access Plan}* the Department has received a resolution incorporating a Department-approved Municipal Public Access Plan into the municipality's Master Plan in accordance with (k) below, access shall be provided in accordance with (o) below for marinas, (p) below for piers, (q) below for beach and dune maintenance activities, and (r) below for shore protection projects. Coastal permit applications shall include a project specific access plan that provides for public access in accordance with all applicable requirements.

(d) *{Municipalities are encouraged to develop and submit to the Department an application for approval of a Municipal Public Access Plan complying with the*

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requirements of (e) through (m) below.) Municipal Public Access Plans shall satisfy the goals specified at N.J.A.C. 7:7E-1.1(c) and the public access goals at (b) above{,}. Municipal Public Access Plans shall additionally meet the requirements at (d)1 through 4 below, as well as all other requirements of this section. {Municipal Public Access Plans shall not provide for access that is contrary to any requirement contained in this chapter (for example, access that encroaches upon threatened or endangered species habitat or is in violation of the dunes rules).}

1. Municipal Public Access Plans shall incorporate fishing access and associated amenities, including parking that accommodates nighttime fishing for a reasonable duration of time, to the maximum extent practicable on or adjacent to tidal waterways and their shores. In the case of a beach, fishing access shall not be required in areas designated for swimming during hours designated for swimming.

2. Municipal Public Access Plans shall require public access along the Hudson River and on adjacent piers in the Hudson River Waterfront Area as defined at N.J.A.C. 7:7E-3.48(a)2 consistent with N.J.A.C. 7:7E-3.48(d) and (e).

3. Municipal Public Access Plans shall require installation and maintenance of appropriate public access signage in accordance with N.J.A.C. 7:7E-8.11(t).

4. Municipal Public Access Plans shall not provide for access that is contrary to any requirement contained in this chapter (for example, access that encroaches upon threatened or endangered species habitat or is in violation of the dunes rules).

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(e) A municipality seeking approval of a Municipal Public Access Plan shall file an application for approval with the Department. The application shall include a proposed Municipal Public Access Plan consisting of the following elements:

1. – 2. (No change from proposal.)

3. A public access needs assessment that evaluates:

i. – ii. (No change from proposal.)

iii. Existing practical limitations to public access. {Alternatives to address any limitations determined to exist shall be provided, where feasible.} Examples of practical limitations include, but are not limited to, a lack of restrooms or parking, *including restrictions on parking availability and duration*, which could effectively limit the public's access to tidal waterways and their shores. *Alternatives to address any limitations determined to exist shall be provided, where feasible;* and

iv. (No change from proposal.)

4. (No change from proposal.)

5. An implementation strategy that:

i. – ii. (No change from proposal.)

iii. Identifies proposed tools to implement the municipal public access plan measures, including, but not limited to, the adoption or amendment of municipal ordinances, the creation of a Public Access Fund established in accordance with (f) below to be used solely for the development and *{maintenance} enhancement* of public access, and the development of other municipal programs that ensure reasonable access to the water,

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and water dependent and water oriented activities along all tidal waterways and their shores;

(1) If the Municipal Public Access Plan includes a provision for monetary compensation in lieu of onsite public access in accordance with (f) below, this portion of the plan shall specify *the location and/or type of uses, for example, residential, commercial, industrial, homeland security, and/or public highways, for which a monetary contribution shall be required/, for example residential, commercial, industrial, and/or homeland security/;*

iv. (No change from proposal.)

v. For municipalities *{subject to} conducting a shore protection project pursuant to (r) below, identifies how the municipality proposes to provide access points to achieve compliance with that subsection;*

vi. – x. (No change from proposal.)

xi. Includes a draft resolution for incorporating the Department-approved, Municipal Public Access Plan into a Master Plan element (for example, the land use, recreation, and/or conservation plan element){.}; *and*

6. *Documentation of any public meetings held by the municipality to accept comments on the proposed Municipal Public Access Plan.*

(f) A Municipal Public Access Plan may require a monetary contribution to be used to provide *new or enhanced* public access elsewhere in the municipality or outside the municipal boundaries along the same waterway as part of a joint project with a county or

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adjacent municipal governmental body in lieu of onsite public access. Municipalities that require a monetary contribution shall establish a dedicated Public Access Fund into which all funds collected shall be deposited. A Municipal Public Access Plan containing a monetary contribution requirement shall specify the circumstances in which such contribution will be required in accordance with (e)5iii(1) above. {If a monetary contribution in lieu of onsite public access is included in a Municipal Public Access Plan,}

1. For projects other than linear projects, the amount of the contribution shall be based upon a determination of the costs that would be incurred if land was purchased for creating access and the access was provided in the form of a walkway, using the following formula:

$$\text{Total Contribution} = \text{TWC} + \text{LAC}$$

where:

TWC = total walkway cost

LAC = land acquisition cost

{1.} i. (No change in text from proposal.)

{2.} ii. The LAC is calculated by dividing the equalized assessed land value of the property by the total square footage of the property and multiplying the resulting value per square foot by the total square footage of the walkway utilized in calculating TWC in (f)1i above. “Equalized assessed land value” means the assessed value of a property divided by

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the current average ratio of assessed to true value for the municipality in which the property is situated, as determined in accordance with N.J.S.A. 54:1-35 et seq.

{3.} *iii.* For example, the total contribution for a 10,000 square foot property with a perpendicular access length of 50 feet, a total {water frontage} *length of the waterfront portion of the property* of 100 feet and an equalized assessed *land* value of \$300,000 would be calculated as follows:

Total Walkway Cost:

Length of perpendicular access		50 ft.
Length of {access parallel to shore} <i>waterfront portion of property</i>		
+ 100 ft.		
<hr/>		
Total linear feet		150 ft.
Minimum walkway width (feet)	x	10 ft.
<hr/>		
Total square feet of walkway		1,500 sq. ft.
Total walkway cost (1,500 sq. ft. x \$7.00)		\$10,500

Land Acquisition Cost

Equalized assessed land value of property		\$300,000
Lot size	÷	10,000 sq. ft.
<hr/>		

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Cost per sq. ft. \$30.00/sq. ft.

Land acquisition (\$30.00/sq. ft. x 1,500 sq. ft. total walkway) \$45,000

Total Contribution = \$10,500 + \$45,000 = \$55,500

2. For linear projects, the amount of contribution shall be based upon a determination of the costs that would be incurred if land was purchased for creating access and the access was provided in the form of a walkway, using the following formula:

$$\text{Total Contribution} = \text{TWC} + \text{LLAC}$$

where:

TWC = total walkway cost

LLAC = linear land acquisition cost

i. The TWC is calculated by first adding the length of the perpendicular access, as measured in feet along the right-of-way from the first non-waterward public road to the waterward portion of the property as measured in feet or one-quarter mile, whichever is less, to the width of the right-of-way along the waterfront. This total access way length is multiplied by 10 feet, the minimum walkway width (subsection (w) below), to give the total square feet of walkway. The TWC is determined by multiplying the total square feet of walkway by \$7.00 (approximate average cost per square foot for walkway construction).

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ii. The LLAC is calculated by dividing the equalized assessed land value, as defined at (f)1ii above, of all waterfront lots located within one-half mile upstream and downstream from the right-of-way centerline at the location where the linear project crosses the water body by the total square footage of all waterfront lots located within one-half mile upstream and downstream from the right-of-way centerline at the location where the linear project crosses the water body and multiplying the resulting value by the total square footage of the walkway utilized in calculating TWC in (f)2i above.

(g) A Municipal Public Access Plan shall not {include} require:

{1. Onsite public access requirements in excess of those that would be required under this chapter in the absence of an approved municipal public access plan;}

{2.} 1. Public access {requirements} along the Hudson River in the Hudson River Waterfront Area as defined at N.J.A.C. 7:7E-3.48(a)2 inconsistent with N.J.A.C. 7:7E-3.48(e). Public access {requirements} elsewhere in the Hudson River Waterfront Area shall be governed by {N.J.A.C. 7:7E-3.48} this section;

{3.} 2. Public access {requirements} at marinas, as defined at N.J.A.C. 7:7E-7.3(d)1. Public access requirements at marinas shall be governed by (o) below; {or}

{4.} 3. Public access {requirements} at piers. Public access requirements at piers shall be governed by (p) below{.};

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4. Public access at existing commercial development that is not classified as “new commercial development” pursuant to (n)1ii below. Public access requirements at existing commercial development shall be governed by (n)1i below;

5. Public access at existing residential development or new residential development where the development consists solely of the construction of one single family home or duplex not in conjunction with a previous development. Public access requirements at existing residential development shall be governed by (n)2i below. Public access at new residential development, consisting solely of the construction of one single family home or duplex not in conjunction with a previous development, shall be governed by (n)2ii below;

6. Public access at existing industrial or public development. Public access requirements at existing industrial or public development shall be governed by (n)3i below;

7. Public access at existing homeland security facilities. Public access requirements at existing homeland security facilities shall be governed by (n)4i below; or

8. Public access at existing or new ports. Public access requirements at ports shall be governed by (n)5 below.

(h) A municipality filing an application for approval of a Municipal Public Access Plan pursuant to (e) above shall provide a full copy of the submittal to the county planning board for the county within which the municipality is located as well as to any regional planning entities with jurisdiction over any portion of the municipality affected by the Municipal Public Access Plan. If the municipality filing an application for approval of a Municipal Public Access Plan has proposed, as a component of the plan, any joint projects

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with *one or more* neighboring {municipality} municipalities, a full copy of the submittal shall also be provided to {that} the neighboring municipality(s) and the county planning board for the county within which the neighboring municipality(s) {is} are located should {that} the municipality(s) be located in a different county.

(i) The Department shall review {the draft} an application for approval of a Municipal Public Access Plan {and supporting documents} to determine whether the plan is consistent with *the broad coastal goals described at N.J.A.C. 7:7E-1.1(c)*, the {standards and} goals for public access at (b) above and all other requirements of this section. {The Department shall notify the applicant in writing of its determination and will publish notice in the New Jersey Register and the DEP Bulletin.}

1. Upon receipt of an application for approval of a Municipal Public Access Plan that meets the requirements of (e) above, the Department shall seek public comment on the application by:

i. Posting the proposed Municipal Public Access Plan on the Department's website;

ii. Notifying by email individuals who have requested notice of applications for approval of Municipal Public Access Plans; and

iii. Publishing notice in the DEP Bulletin.

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2. The Department shall accept public comments on the proposed application for approval of a Municipal Public Access Plan for 30 days following publication of the notice in the DEP Bulletin.

3. After the close of the public comment period, the Department may request revisions to the proposed Municipal Public Access Plan.

4. If revisions are requested, the Department shall, in writing, notify the municipality within 60 days of receipt of the revisions that the proposed Municipal Public Access Plan either:

i. Satisfies the requirements of this section and is approved; or

ii. Does not satisfy the requirements of this section and is not approved with explanation.

5. If no revisions are requested by the Department, the Department shall, in writing, notify the municipality within 60 days of the end of the public comment period that the proposed Municipal Public Access Plan either:

i. Satisfies the requirements of this section and is approved; or

ii. Does not satisfy the requirements of this section and is not approved with explanation.

6. The Department shall provide notice of its determination under (i)4 or 5 above by:

i. Posting on the Department's website;

ii. Notifying by email individuals who have requested notice of applications for approval of Municipal Public Access Plans; and

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iii. Publishing the determination in the DEP Bulletin.

(j) A municipality which has received approval of a Municipal Public Access Plan shall as a condition of the approval:

1. Initiate action necessary to incorporate the *Department*-approved Municipal Public Access Plan into the municipality's Master Plan; {and}

2. Notify the Department two weeks in advance of the dates and times of any scheduled public meetings on the Department-approved Municipal Public Access Plan. The Department shall post the meeting information on its website and notify by email individuals who have requested notice of applications for approval of Municipal Public Access Plans;

{2.} 3. Upon adoption of the Municipal Public Access Plan into the municipal Master Plan, provide the Department with a copy of an approved resolution incorporating the {DEP}Department-approved Municipal Public Access Plan into the Master Plan{.}; and

4. Five years after the date of adoption of the Municipal Public Access Plan into the municipal Master Plan, and every five years thereafter, submit to the Department a report detailing:

i. The status of all projects that have been undertaken in accordance with the Municipal Public Access Plan;

ii. All monies received into the municipality's dedicated Public Access Fund and an accounting of all expenditures of those monies; and

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iii. Any problems encountered in pursuit of the plan's objectives and goals and proposed remedies to assure the objectives and goals of the plan are met.

(k) Upon receipt by the Department of the resolution incorporating the approved Municipal Public Access Plan into the municipality's Master Plan, public access required to satisfy the conditions of a {Department} coastal permit for development in the municipality for permit applications filed with the Department subsequent to the Department's receipt of the resolution shall be provided in accordance with the Municipal Public Access Plan. *The Department shall include on the posted Department-approved Municipal Public Access Plan the date of receipt of the resolution.*

(l) Department review and approval is required before a municipality may make changes to an approved Municipal Public Access Plan that impact the location or type of access to be provided, or that institute or amend the terms of a contribution in lieu of an onsite public access requirement pursuant to (f) above. In support of a request to amend the approved plan under this subsection, the municipality shall submit to the Department the approved plan with the information specified in (e) above updated to reflect the proposed change. This submission shall {provide information with reference to the requested change to the plan and shall} detail how the proposed change affects the approved plan. *The Department shall review and make a determination on the Municipal Public Access Plan amendment request in accordance with (i) above. Upon Department*

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approval of the amended Municipal Public Access Plan, the municipality shall comply with (j) above.

{(m) An approved Municipal Public Access Plan shall be valid for a period of six years. However, the plan may be renewed. To obtain plan renewal, at least six months before the plan expires the municipality shall provide a copy of the expiring Municipal Public Access Plan, together with a progress report identifying:

1. The status of all projects that have been undertaken in accordance with the existing, approved, plan since the approval or last renewal;

2. Projects not yet initiated in accordance with the plan with an explanation of why the project has not been initiated and a new proposed schedule for initiation and completion of the project;

3. Proposed amendments to the approved plan;

4. All funds received as contribution in lieu of onsite access and a detailed accounting of all expenditures of those funds; and

5. Any problems encountered in pursuit of the plan's objectives and goals and proposed remedies to assure the objectives and goals in the proposed new plan are met.}

(m) The Department shall revoke its approval of a Municipal Public Access Plan for good cause. Good cause includes failure to implement the Municipal Public Access Plan and/or noncompliance with the Municipal Public Access Plan such as, but not limited to, inappropriate expenditure of dedicated Public Access Fund monies for purposes other than

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public access, conversion of public access sites to other uses, and failure to maintain existing public access and signage.

1. Upon determination that good cause exists, the Department shall furnish written notice of its determination to the municipality by certified mail, providing 30 days within which to either remedy the noncompliance, provide an explanation of why such noncompliance cannot be remedied, offer a plan to remedy such noncompliance, or demonstrate to the Department that good cause for revocation does not exist. Any remedial plan shall indicate the time necessary to implement the remedy.

2. If the above requirements are not met, the Department shall provide the Municipality with written notice, by certified mail, of intent to revoke the Department's approval of the Municipal Public Access Plan and of the Municipality's right to a hearing pursuant to the provisions of N.J.A.C. 7:7-5. A request for a hearing shall be addressed to the Office of Legal Affairs, ATTENTION: Adjudicatory Hearing Requests, Department of Environmental Protection, Mail Code 401-04L, PO Box 402, 401 East State St., 4th floor, Trenton, New Jersey 08625-0402. A copy shall also be submitted to the Office of Land Use Planning, Mail Code 401-07C, PO Box 402, 401 East State St., 7th floor, Trenton, New Jersey 08625.

3. If a hearing under (m)2 above is not requested within 10 days of receipt of said notice, the Municipal Public Access Plan shall be revoked.

(n) In municipalities that do not have an approved Municipal Public Access Plan, for sites which are located on or adjacent to tidal waterways and their shores, public access along and use of the beach and the shores shall be provided as {follows} specified in this

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subsection and, as applicable, in (o) below for marinas and (p) below for piers. Public access may include any one or a combination of the options listed at (b)3 above. When determining whether proposed public access is appropriate and/or sufficient, {The} the Department shall consider factors such as type of public access available, the compatibility of the proposed public access with the applicant's proposed use of the site, square footage of access area, and environmental impact or benefit {when determining whether proposed public access is appropriate}. The Department shall not approve public access that is contrary to any requirement contained in this chapter (for example, access that encroaches upon threatened or endangered species habitat or is in violation of the dunes rules):

1. Commercial development shall provide both visual and physical access as follows:

i. For existing commercial development, except for existing commercial development classified as "new commercial development" pursuant to (n)1ii below, where the proposed activity consists of maintenance, rehabilitation, renovation, redevelopment, or expansion that remains entirely within the parcel containing the existing development, *no public access is required if there is no existing public access onsite. Any existing public access shall be maintained or equivalent public access shall be provided onsite. Equivalent public access shall include access that provides for opportunities to participate in the same activities, such as fishing, swimming and passive recreation, in the same manner and by the same number of people as in the existing public access area/. If there is no existing public access onsite, no public access is required/};*

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ii. Except as provided in (n)Iii(1) below, {For} for new commercial development, access shall be provided onsite, at a minimum during normal operating hours. For the purposes of this subparagraph, “new commercial development” also includes the conversion of any existing non-commercial use to a commercial use and any change in an existing development that would result in either/:

(1) Greater} greater than a cumulative 50 percent increase in the area covered by buildings, asphalt, or concrete paving; or

{(2) Development on a parcel which was not included in the existing development} development outside the parcel containing the existing development;

{iii. Public access proposed by the applicant to satisfy the requirements of this paragraph may include any one or combination of the following:

(1) A public access way designed in accordance with (w) below, located parallel to the shoreline with perpendicular access;

(2) A boat ramp, pier, fishing or other direct access to the waterway;

(3) A waterfront pocket park;

(4) Public restrooms to accommodate those utilizing public access; and/or

(5) Additional public parking to accommodate those utilizing public access;}

(1) Public access along the Hudson River and on adjacent piers in the Hudson River Waterfront Area as defined at N.J.A.C. 7:7E-3.48(a)2 shall be provided in accordance with N.J.A.C. 7:7E-3.48(d) and (e).

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2. Residential development shall provide both visual and physical access as follows:

i. At an existing residential development, where the proposed activities consist solely of accessory development or structural shore protection, *no public access is required if there is no existing public access onsite. Any existing public access shall be maintained. If it is necessary to permanently impact the existing public access in order to perform the activities, equivalent access shall be provided onsite. If currently there is no public access onsite, no public access is required;*

ii. (No change from proposal.)

iii. *Except as provided in (n)2iii(3) below, {For} for new residential development consisting of more than one single family home or duplex, or the conversion of any existing non-residential use to a residential use consisting of more than one single family home or duplex, that has a total {combined water} frontage of 500 linear feet or less on areas subject to N.J.A.C. 7:7E-3.50, public access shall be provided onsite. {as follows:*

(1) Unless the applicant demonstrates that onsite public access is not feasible, in accordance with (n)2iii(2) below, public access proposed to satisfy the requirements of this paragraph shall be provided onsite in accordance with (n)1iii above;}

{(2)} (1) If the applicant demonstrates that onsite public access is not feasible, based on the size of the site, the character of the waterway, and environmental impact or benefits, equivalent offsite public access shall be provided on the same waterway within the same municipality as the residential development. The Department shall consider factors such as type of public access available (for example, if swimming access is available onsite, then

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swimming access should be available at the offsite location), {cost,} square footage of access area, and environmental impact/benefit when determining whether the proposed offsite public access is equivalent to that which would have been required onsite;

{(3)} (2) If the applicant demonstrates that offsite public access within the same municipality is not feasible because there are no sites available upon which to provide public access in accordance with (n)2iii/(2)/(1) above, equivalent offsite public access shall be provided on the same waterway within a neighboring municipality where the access is consistent with the neighboring municipality's MPAP or, if there is no MPAP, the access is located and designed to be consistent with {local requirements such as local zoning and ordinances} (b) above. The Department shall consider factors such as type of public access available (for example, if swimming access is available onsite, then swimming access should be available at the offsite location), {cost,} square footage of access area, and environmental impact/benefit when determining whether the proposed offsite public access is equivalent to that which would have been required onsite;

(3) *Public access along the Hudson River and on adjacent piers in the Hudson River Waterfront Area as defined at N.J.A.C. 7:7E-3.48(a)2 shall be provided in accordance with N.J.A.C. 7:7E-3.48(d) and (e).*

iv. *Except as provided in (n)2iv(1) below, {For} for new residential development consisting of more than one single family home or duplex or the conversion of any existing non-residential use to a residential use consisting of more than one single family home or*

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duplex, where the development has a total {combined water} frontage of more than 500 linear feet on areas subject to N.J.A.C. 7:7E-3.50, public access shall be provided onsite {in accordance with (n)1iii above};.

(1) Public access along the Hudson River and on adjacent piers in the Hudson River Waterfront Area as defined at N.J.A.C. 7:7E-3.48(a)2 shall be provided in accordance with N.J.A.C. 7:7E-3.48(d) and (e).

3. Except as provided at (n)4 and 5 below, industrial development and public development, *except for public highways*, shall provide both visual and physical access {as follows;} *in accordance with (n)3i through iv below. Public highways shall meet the requirements at (n)6 below.*

i. For existing industrial or public development, except as provided at (n)3ii below, where the proposed activity consists of the maintenance, rehabilitation, renovation, redevelopment, or expansion that remains entirely within the parcel containing the existing development, *no public access is required if there is no existing public access onsite. Any existing public access shall be maintained or equivalent onsite public access shall be provided. Equivalent public access shall include access that provides for opportunities to participate in the same activities (such as fishing, swimming, or passive recreation), in the same manner and by the same number of people as in the existing public access area/. If there is no existing public access onsite, no public access is required};*

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ii. *Except as provided in (n)3ii(1) below, {For} for new industrial or public development, including the conversion of any existing use to an industrial or public use, public access shall be provided onsite during normal operating hours, unless it can be demonstrated that continued public access is not practicable based on the risk of injury from proposed hazardous operations, or substantial permanent obstructions, or upon documentation of a threat to public safety due to unique circumstances concerning the subject property, and no measures can be taken to avert these risks. In cases where the Department concurs that the risk is too great for onsite public access, access shall be provided in accordance with (n)3iii below. For the purposes of this paragraph, “new industrial or public development” includes development of areas not within the parcel containing the existing development. {Where onsite public access is required, public access shall be provided in accordance with (n)1iii above;}*

(1) Public access along the Hudson River and on adjacent piers in the Hudson River Waterfront Area as defined at N.J.A.C. 7:7E-3.48(a)2 shall be provided in accordance with N.J.A.C. 7:7E-3.48(d) and (e).

iii. Where it has been demonstrated that onsite access is not practicable based on the presence of substantial permanent obstructions or the risk of injury from proposed hazardous operations, *or upon documentation of a threat to public safety due to unique circumstances concerning the subject property, and no reasonable measures can be taken to avert these risks, equivalent offsite public access shall be provided on the same waterway and within the same municipality as the development. The Department shall consider*

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factors such as type of public access available (for example, if swimming access is available onsite, then swimming access should be available at the offsite location), {cost,} square footage of access area, and environmental impact/benefit when determining whether the proposed offsite public access is equivalent to that which would have been required onsite;

iv. If the applicant demonstrates that offsite public access within the same municipality is not feasible because there are no sites available upon which to provide public access in accordance with (n)3ii above, equivalent offsite public access shall be provided on the same waterway within a neighboring municipality where the access is consistent with the neighboring municipality's Municipal Public Access Plan or, if there is no Municipal Public Access Plan, the access is located and designed to be consistent with {local requirements such as local zoning and ordinances} (b) above.

4. Homeland security facilities shall provide both visual and physical access as follows:

i. For existing homeland security facilities, except as provided at (n)4ii below, where the proposed activity consists of maintenance, rehabilitation, renovation, redevelopment, or expansion that remains entirely within the parcel containing the existing development, *no public access is required if there is no existing public access onsite. Any existing public access shall be maintained onsite or equivalent public access shall be provided either onsite or offsite on the same waterway and within the same municipality as the development. Equivalent public access shall include access that provides for opportunities to participate in the same activities such as fishing, swimming, or passive recreation, in the same manner*

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and by the same number of people as in the existing public access area/. If there is no existing public access onsite, no public access is required};

ii. *Except as provided in (n)4i(1) below, {For} for new homeland security facilities, including the conversion of a non-homeland security facility to a homeland security facility, or the expansion of an existing homeland security facility onto areas not within the parcel containing the existing development, the applicant may provide either onsite public access or equivalent offsite public access on the same waterway and within the same municipality as the development. The Department shall consider factors such as type of public access available (for example, if swimming access is available onsite, then swimming access should be available at the offsite location), {cost,} square footage of access area, and environmental impact/benefit when determining whether proposed offsite public access is equivalent to that which would have been required onsite;*

(1) Public access along the Hudson River and on adjacent piers in the Hudson River Waterfront Area as defined at N.J.A.C. 7:7E-3.48(a)2 shall be provided in accordance with N.J.A.C. 7:7E-3.48(d) and (e).

5. Ports, as defined at N.J.A.C. 7:7E-3.11, shall provide both visual and physical access as follows:

i. For *{all port facilities,} existing ports, public access shall be provided as follows:*

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(1) No public access is required if there is no existing public access onsite. Any existing public access shall be maintained or equivalent onsite public access shall be provided. If it can be demonstrated that continued onsite public access is not practicable based on the risk of injury from proposed hazardous operations, or substantial permanent obstructions, or upon documentation of a threat to public safety due to unique circumstances concerning the subject property, and no measures can be taken to avert these risks, equivalent public access shall be provided offsite on the same waterway and within the same municipality as the development. The Department shall consider factors such as the type of public access available (for example, if {swimming} linear or visual access is available onsite then {swimming} linear or visual access should be available at the offsite location), {cost,} square footage of access area, and environmental impact/benefit when determining whether the proposed offsite public access is equivalent to that which would have been required onsite. { If there is no existing public access onsite, no public access is required.}

(2) If the applicant demonstrates that offsite public access within the same municipality is not feasible because there are no sites available upon which to provide public access in accordance with (n)5i(1) above, equivalent offsite public access shall be provided on the same waterway within a neighboring municipality where the access is consistent with the neighboring municipality's Municipal Public Access Plan or, if there is no Municipal Public Access Plan, the access is located and designed to be consistent with (b) above.

ii. For new ports, no public access is required.

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6. Public highways, including superhighways, shall provide both visual and physical access as follows. For purposes of this paragraph, an example of visual and physical access is a sidewalk on or adjacent to a bridge:

i. Superhighways, specifically, the Garden State Parkway, New Jersey Turnpike, Atlantic City Expressway, and Interstates 76, 78, 80, 95, 276, 278, 195, 295, and 676, shall provide access as follows:

(1) Where the proposed activity consists of maintenance or rehabilitation that remains entirely within the paved constructed development, no public access is required if there is no existing public access onsite. Any existing public access shall be maintained or equivalent public access shall be provided offsite on the waterway(s) and within the municipality(s) where the development is located. Equivalent public access shall include access that provides for opportunities to participate in the same activities, in the same manner and by the same number of people as in the existing public access area;

(2) Where the proposed activity is an expansion outside the paved constructed development, public access shall be provided offsite on the waterway(s) and within the municipality(s) where the development is located.

(3) If the applicant demonstrates that offsite public access in the same municipality is not feasible because there are no sites available upon which to provide public access in accordance with (n)6i(1) and (2) above, equivalent offsite public access shall be provided on

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the same waterway(s) within a neighboring municipality where the access is consistent with the neighboring municipality's Municipal Public Access Plan or, if there is no Municipal Public Access Plan, the access is located and designed to be consistent with (b) above.

ii. Public highways, other than superhighways, shall provide both physical and visual access as follows:

(1) For existing public highways, except as provided at (n)6ii(2) below, where the proposed activity consists of the maintenance or rehabilitation that remains entirely within the paved constructed development, no public access is required if there is no existing public access onsite. Any existing public access shall be maintained or equivalent onsite public access shall be provided. Equivalent public access shall include access that provides for opportunities to participate in the same activities, in the same manner and by the same number of people as in the existing public access area.

(2) For new public highways, including expansions outside the paved constructed development, public access shall be provided onsite unless it can be demonstrated that public access is not practicable based on the risk of injury from proposed hazardous operations, or substantial permanent obstructions, or upon documentation of a threat to public safety due to unique circumstances concerning the subject property, and no measures can be taken to avert these risks. In cases where the Department concurs that the risk is too great for onsite public access, access shall be provided in accordance with (n)6ii(3) below;

(3) Where it has been demonstrated that onsite access is not practicable based on the presence of substantial permanent obstructions or the risk of injury from proposed hazardous

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operations, or upon documentation of a threat to public safety due to unique circumstances concerning the subject property, and no reasonable measures can be taken to avert these risks, equivalent public access shall be provided offsite on the waterway(s) and within the municipality(s) where the development is located where the access is consistent with the municipality's Municipal Public Access Plan or, if there is no Municipal Public Access Plan, the access is located and designed in accordance with (b) above;

(4) If the applicant demonstrates that offsite public access in the same municipality is not feasible because there are no sites available upon which to provide public access in accordance with (n)6ii(2) and (3) above, equivalent offsite public access shall be provided on the same waterway(s) within a neighboring municipality where the access is consistent with the neighboring municipality's Municipal Public Access Plan or, if there is no Municipal Public Access Plan, the access is located and designed to be consistent with (b) above.

(o) Marinas, as defined at N.J.A.C. 7:7E-7.3(d)1, shall provide both visual and physical public access {as follows:} in accordance with this subsection. Public access may include any one or a combination of the options listed at (b)3 above. When determining whether proposed public access is appropriate and/or sufficient, the Department shall consider factors such as type of public access available, the compatibility of the proposed public access with the applicant's proposed use of the site, square footage of access area, and environmental impact or benefit.

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1. For existing marina development where the proposed activity consists of maintenance, rehabilitation, renovation, redevelopment, or expansion that remains entirely within the parcel {which included} containing the existing development, *no public access is required if there is no existing public access onsite, except as provided at (o)3 below. Any existing public access shall be maintained. If it is necessary to impact the existing public access in order to perform the proposed activities, equivalent public access shall be provided onsite. Equivalent public access shall include access that provides for opportunities to participate in the same activities, such as fishing, swimming, and passive recreation, in the same manner and by the same number of people as in the existing public access area/. If there is no existing public access onsite, no public access is required except as provided at (o)3 below/;*

2. For new marina development, public access shall be provided onsite during normal operating hours. For the purposes of this subsection, “new marina development” includes any change in the existing development that would result in greater than a cumulative 50 percent increase in the area covered by buildings, asphalt, or concrete paving, or proposed development of areas not within the parcel containing the existing development /for which a coastal permit was obtained if the marina was not previously permitted because a coastal permit was not required, includes development on a lot or lots which are purchased after April 4, 2011/;

3. (No change from proposal.)

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4. Applicants for new marinas, as described at (o)2 above, shall provide to the Department at the time of application, for its review and approval, a public access plan for the marina development which shall include the following:

{(1) i. A site plan identifying the location and type of access provided, including both existing and proposed, as well as any areas closed to public access based on the presence of substantial permanent obstructions, {or} the risk of injury from proposed hazardous operations, or a threat to public safety due to unique circumstances concerning the subject property, and where no reasonable measures can be taken to avert these risks. The plan shall include an explanation of what the specific risks and hazards are and shall indicate where access has been enhanced to compensate for the area closed due to the dangerous or hazardous conditions/. Public access shall be provided in accordance with (n)liii}; and

{(2) ii. A listing of the normal operating hours for the marina;

5. Once a marina access plan has been approved by the Department, any proposed changes to that plan shall require additional Department review and approval, regardless of whether or not a permit modification is also required. {For example, a change in the marina's operating hours that would not require a permit or permit modification, would result in a change in the public's ability to use the public access and therefore requires review by the Department.} In support of a request to amend the approved plan under this paragraph, the applicant shall submit to the Department the approved plan updated to

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reflect the proposed change(s). This submission shall provide information with reference to the requested change(s) to the plan and shall detail how the proposed change(s) affects the approved plan. If the proposed change(s) results in /curtailment of public access hours or/ a reduction in any way of public access, the submission shall additionally specify proposed changes to offset proposed reductions in public access.

(p) Except in accordance with the Hudson Waterfront area at N.J.A.C. 7:7E-3.48, and Atlantic City at N.J.A.C. 7:7E-3.49, development which is proposed to be located on an existing pier shall provide public access in accordance with the type of development being proposed, that is, commercial, residential, industrial or public, homeland security, or ports (see (n){1, 2, 3, 4 or 5, respectively,} above).

(q) – (z) (No change from proposal.)